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PRETRIAL INTERVENTION IN NEW JERSEY

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April 1978

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I. INTRODUCTION

A. Pretrial Intervention Defined

The concept of pretrial diversion of alleged offenders out of the formal criminal justice system is by no means a recent discovery.[1] In one form or another pretrial diversion has been practiced and accepted in this country for years and has existed under the titles of "police discretion"[2] and "prosecutorial discretion."[3] Within recent years there has been a movement afoot for formalizing the prosecutor's exercise of discretion[4] and this has resulted in a differentiation between Pretrial Diversion and other forms of discretionary treatment.[5]

There seem to be certain generally recognized characteristics of a pretrial diversion program.[6] One of these characteristics is a structured program which provides for early delivery of rehabilitative services to the enrolled participant. This rehabilitation program can be directed at correcting any social or behavioral problem, but most frequently it will attempt to correct unemployment, drug or alcohol addiction, or general adjustment problems.[7]

If the participant successfully completes his prescribed program, he will not be prosecuted, but

should he fail to satisfy the requirments, he will be returned for criminal processing.

The National Pretrial Intervention Service Center has recognized three essential characteristics of a Pretrial Diversion program: (1) diversion of the accused out of the criminal process occurs before formal adjudication of guilt or innocence; (2) existence of formal eligibility and procedural standards for diversion; and (3) availability of community-based social and rehabilitative services for the accused immediately after diversion.[8]

It is obvious that the most significant difference between the well known and long standing practices of prosecutorial and police discretion and the new procedures known as Pretrial Diversion is the second essential characteristic. If a prosecutor is to divert a case from the criminal process, it has always been true that he must do so before a formal adjudication, for after adjudication,he no longer has control of the matter. The third characteristic is likewise not unique, for prosecutors have long used their power to "encourage" individuals who are charged with an offense to take advantage of community-based social and rehabilitative services. Frequently a drunk or an addict has been encouraged to seek help in return for having charges reduced or dropped, and many a domestic complaint has

been nulle prossed after the parties sought counseling. People suspected of suffering from mental illness have frequently had their criminal charges reduced or dropped on the condition that they seek professional help.

The second characteristic would then seem to be the sole unique element, for it is the formalized eligibility and procedural standards that separates the new Pretrial Diversion from the traditional exercise of prosecutorial discretion. The degree to which these standards are formalized will vary as will the procedural method utilized. An internal document issued by the prosecutor to his staff would meet the letter of this characteristic but it would not satisfy normally accepted standards to qualify the practices as a pretrial diversion program.

There are certain general goals for most pretrial diversion programs that seem to be commonly recognized. They are;

(1) Reduce congestion in criminal court dockets and thereby allow the courts and prosecutors to husband their resources for the handling of the more serious crimes;

(2) Reduce recidivism by providing for an alternative to incarceration, - community-based rehabilitation - which would be more effective and less costly than incarceration; and

(3) Benefiting society by the training and placement of previously unemployed or underemployed persons.[9]

The priority to be afforded each of these goals varies between programs, and some programs list additional goals while others have fewer. The goals of the New Jersey Pretrial Intervention program have been recognized as two fold and have been identified by the New Jersey Supreme Court as "rehabilitation" and "expeditious disposition". The court also held that expeditious disposition is subordinate to the rehabilitative function.[10]

New Jersey is thus different in that it has chosen to make rehabilitation a primary goal, and it has not emphasized job training and placement as separate goals. New Jersey has incorporated these commonly recognized goals into a single goal of rehabilitation, for by providing services directed at the offender's needs, New Jersey hopes to rehabilitate the offender and thus minimize the likelihood of him becoming a recidivist.

In New Jersey Pretrial Intervention has been defined as:

> "(A) formalized program for selecting from the criminal justice process -- after the filing of the complaint but before trial or the entry of the plea -- adult defendants who appear capable, with the assistance of supervision, counseling or other services, of showing that they are not likely in the future to commit criminal or disorderly acts: for removing such defendants from the ordinary course of prosecution by postponing further criminal proceedings for periods of 3 months to one year: and for dismissing charges against such defendants upon completion of a program of supervision, counseling or other services, and upon a showing that the interests of society may best be served by such a dismissal."[11]

The offically stated purposes of the New Jersey program are:[12]

> (a) To provide defendants with opportunities to avoid ordinary prosecution by receiving early rehabilitation services, when such services can reasonably be expected to deter future criminal behavior by the defendant, and when there is an apparent causal connection between the offense charged and the rehabilitative need, without which both the alleged offense and the need to prosecute might not have occurred.
>
> (b) To provide an alternative to prosecution for defendants who might be harmed by the imposition of criminal sanctions as presently administered, when such an alternative can be expected to serve as sufficient sanction to deter criminal conduct.
>
> (c) To provide a mechanism for permitting the least burdensome form of prosecution possible for defendants charged with "victimless" offenses.
>
> (d) To assist in the relief of presently overburdened criminal calendars in order to focus expenditure of criminal justice resources on matters involving serious criminality and severe correctional problems.
>
> (e) To deter future criminal or disorderly behavior by a defendant/participant in pretrial intervention.

Does New Jersey's Pretrial Intervention program satisfy the nationally recognized criteria for a pretrial diversion program? A reading of the enabling rule itself[13] will not give us sufficient information to answer this question, for it does not tell us when the diversion occurs, it does not tell us whether there must exist formal eligibility and procedural standards, and it does not tell us if there are available community-based social and rehabilitative services for the accused immediatly after diversion. The rule itself only indicates

that counties may draw up pretrial intervention programs for the approval of the Supreme Court. The contents of these programs are not specified.

The answer to the question is provided by the official guidelines for the programs published by order of the Supreme Court.

Guideline 6 provides that "Applications for PTI should be made as soon as possible after commencement of proceedings, but, in an indictable offense, not later than 25 days after original plea to the indictment."[14] It is apparent that this does not in a literal sense preclude diversion after a formal adjudication of guilt or innocence, but as will be seen later, in practice this guideline is interpreted to have such a meaning.[15]

The remaining guidelines are in and of themselves a set of formal eligibility and procedural requirements and thus clearly satisfy that criteria.

In order to determine if any single county program approved by the Supreme Court has available community-based social and rehabilitative services for the accused immediatly after diversion , it would be necessary to review each county program plan submitted for approval, and such a check would show that such services are available in all counties and, in fact, a program without such services would not be approved.[16]

It is thus clear that the New Jersey Pretrial

Intervention program contains the essential elements necessary to be recognized by the National Pretrial Intervention Service Center as a valid pretrial diversion program.

B. Purpose

By the simple expedient of adopting a court rule, R 3:28 in 1970, the Supreme Court planted the seed for a program that has since spawned the growth of a bureaucracy which attempts to justify the existence of over 200 state employees and the expenditure of an unknown amount of money well in excess of $2,265,263.00 per year.[17] The name of the program is Pretrial Intervention and the name of the bureaucrary is the Pretrial Services Division of the Administrative Office of the Courts.

In an unprecedented speech before a joint session of the State Legislature,[18] the Chief Justice of the Supreme Court of New Jersey made certain comments regarding the existing program. He stated that Pretrial Intervention "as its name implies...intervenes...to remove certain accused defendants from the revolving door corruption and futility of imprisonment where that course is warranted and compatible with public safety."[19] He further noted that the individuals who were enrolled in the program were "usually first-time offenders accused of non-violent crimes" and said that by "removing

such marginal offenders from further prosecution, the pressures on the criminal calandars would be relieved and once these less serious offenses were eliminated from trial, judges and prosecutors would be able to devote their attention to important cases relating to the public security."[20]

The primary purpose of this paper will be to take a look at the New Jersey Pretrial Intervention Program to see to what extent it accomplishes its goals.

In this time of large national deficits and unbalanced state and local budgets, it seems most appropriate to review major programs which involve the expenditure of large amounts of tax revenue to determine if the goals of a program are realistic and, if they are, has the program lived up to the expectations of its proponents and met these goals. It seems obvious that if the program's goals are not being met then either the goals must be changed or the program must be changed to enable it to meet the goals.

The ABA Commission on Correctional Facilities and Services has noted:[21]

> (I)t has been amazingly simple, from the criminal justice system viewpoint, to implement a PTI program once the necessary desire and committment were obtained from the prosecutors and judges. The watchword had been informality and flexibility- and current programs have largely existed without legal difficulties or challenge. This has undoubtedly been helpful to the fledgling movement....However, by virtue of its rapid growth and nature, pretrial intervention must be prepared to pass legal muster.

Over the past eight years Pretrial Intervention programs in New Jersey have expended large amounts of tax revenue, and it seems that the time has long since passed when the proponents of future expenditures should be required to justify their requests.

It is not my intent to say that a humanitarian program such as pretrial intervention that has as its primary goal rehabilitation, must be cost effective in a business sense, but it is felt that, to justify future expenditures, the program should have some sound basis for showing that it does in fact rehabilitate, and does this in a relatively cost efficient manner as compared to other similar programs.

The Chief Justice's remarks raise a number of questions which include: (1) would the typical first time offender accused of a non-violent crime have been caught prior to the establishment of the pretrial intervention program in the "revolving-door corruption and futility of imprisonment"? (2) has the program truthfully relieved pressures on the criminal calendars? and(3) what hard evidence exists to support these claims?

The Chief Justice specifically raised what he called understandable public questions and attempted to answer them. The questions and answers were:[22]

(1) Is this program compatible with legislative policy? Answer: It is.

(2) Does it threaten public security? Answer: No.

(3) Does the court rule invade the executive authority of the prosecutor? Answer: No.

(4) Is the program potentially successful? Answer: It is by the evidence available.

(5) What is the stake of society and the taxpayer in pretrial intervention? Answer: Very high, both as to the security of the community and the taxpayers pocketbook.

Despite the affirmative sound of these statements, to date no real attempt to determine the social and economic effectiveness of the PTI concept has been made. What few reports have been generated have been idealistic, self-serving, statistically invalid descriptions of how the concept should work. This is true both on the local and the national level.

Chief Justice Hughes stated, "the true test (of the programs effectiveness) of course, is measured by recidivism -that is, re-arrest after successful program participation."[23] This, as will be later shown, is an unrealistic evaluator, for it is not sufficiently accurate nor does it show to what degree the program meets its goals. The American Friends Service Committee has noted that "We have no way of determining the real rate of recividism because most criminals are undetected and most suspected criminals do not end up being convicted."[24] Statistics would seem to support this evaluation for although there were 396,448[25] crime index offenses in New Jersey in 1976, there were only 71,211[26] arrests and these only resulted in 15,858[27] convictions. Thus it can be seen that if a successful program participant decides to commit another crime index offense there is only

a one in six chance that he will be arrested and declared a recividist.

The period in which the program participant is followed, the effectiveness of the information gathering system, and the true nature of any comparison groups are all factors that will greatly influence the validity of any recividism rates.

The Friends Committee made another comment that really goes to the heart of the point that recividism is not the proper scale for evaluating the success or failure of the program. They commented:

> "Using rates of recividism as the criterion for evaluating the success or failure of criminal justice programs poses more fundemental problems than the unreliability of the statistics. Surely it is ironic that although treatment ideology purports to look beyond the criminal's crime to the whole personality, and bases its claims to sweeping discretionary power on this rationale, it measures its success against the single factor of an absence of reconviction for a criminal act. Whether or not the subject of the treatment process has acquired greater self understanding, a a sense of purpose and power in his own destiny, or a new awareness of his relatedness to man and the universe is not subject to statistical study and so is omitted from the evaluation."[28]

Rather than use this simplistic test proposed by the Chief Justice, I shall set forth the officially declared goals and purposes of the program and then utilizing available information, show to what degree the program has been able to reliably measure its accomplishments and, using criteria other than recividism, will attempt to show more reliably the true effect of the program. In that many of the questions raised by

the Chief Justice touch upon the declared goals and purposes, I shall examine the questions and answers to ascertain to what degree his answers are supported by fact.

A few years ago when legal commentors were scrutinizing the then infant pretrial diversion programs, they foresaw constitutional infirmities,[29] and it will be a purpose of this paper to analyze the New Jersey procedures to determine to what degree, if any, they might infringe on individual rights granted by the Constitution.

C. Other Terms Defined

There are a number of other terms associated with the New Jersey PTI program that should be defined. They are:

(1) Participant - A defendant who has been removed from the ordinary course of prosecution in accordance with New Jersey Court Rule 3: 28

(2) Rejection - Denial of entry into a pretrial intervention program or voluntary choice not to seek entry.

(3) Termination - Involuntary return of a participant to ordinary prosecution.

(4) Dismissal - Dismissal of charges against a participant after successful program completion.[30]

II. GENERAL INFORMATION ON THE CRIMINAL JUSTICE SYSTEM IN NEW JERSEY

In order to fully appreciate the significance of the Pretrial Diversion program in New Jersey, it is necessary to first understand the manner in which offenses are dilineated, the structure of the court system and the alternative means of diversion available. It is therefore my intent at this point to briefly set forth this information in order to provide readers with facts that will assist them in evaluating the PTI program in New Jersey.

A. Type Offense

Although the term "felony" is commonly used in criminal law literature and practice in New Jersey, in fact, New Jersey does not have a class of offenses called felonies.

The statutes provide that:[31]

> "Assaults, batteries, false imprisonments, affrays, riots, routs, unlawful assemblies, nuisances, cheats, deceits, and all other offenses of an indictable nature at common law, and not otherwise expressly provided for by statutes are misdemeanors.

The penalty for a misdemeanor is, unless otherwise provided by law, a fine of not more than $1000.00 or imprisonment for not more than three years or both.[32]

High misdemeanors are specifically designated as such by statute, and the penalty for a high misdemeanor includes, unless otherwise provided, a fine of not

more than $2000.00 and/or incarceration not to exceed 7 years.[33]

The Disorderly Persons Law[34] sets out a listing of all the criminal offenses falling below the severity level of misdemeanors. It limits the punishment for such offenses to imprisonment in the county workhouse, penitentiary or jail for not more than 6 months, or a fine of not more than $500.00 or both, except as otherwise provided.[35]

In New Jersey, an individual may not be held to answer for a criminal charge unless on presentment or indictment of a grand jury, except in cases that were not prosecuted upon indictment at common law.[36] High misdemeanors and virtually all misdemeanors are within the constitutional guarantee of an indictment.[37] This constitutional right to an indictment is solely for common law crimes, and the touchstone for determining whether an indictment is or is not constitutionally requisite is whether the offense was an offense requiring an indictment at common law.[38] Disorderly Persons offenses belong to a category of common law "minor offenses" which were not in their nature indictable.[39]

B. Court Structure and Procedure

The trial court structure in New Jersey includes the Superior Court, (Law Division,) the County Courts, the County District Courts and the Municipal Courts.

The Superior Court,(Law Division) has general criminal jurisdiction throughout the state while the Law Division of the County Courts has criminal jurisdiction for matters occurring within the county.[40] As a practical matter the majority of the criminal work is handled by County Court Judges. The County District Courts and the Municipal Courts have concurrent criminal and quasi criminal jurisdiction over ordinance violations, disorderly persons violations and other specified crimes and offenses, including some crimes where indictment and trial by jury can be waived.[41]

The Chief Justice of the Supreme Court has declared that one of the principal aims of the Court is to achieve complete unification of the state court system, and with the aid of a $94,000.00 SLEPA grant, the Administrative Office of the Courts has undertaken the development of a comprehensive plan that will eventually be submitted to the Governor and the Legislature. To say the least, at the present time the overlapping jurisdictions of the different courts is confusing, and in an effort to dispell some of this confusion I will briefly trace the route of a typical criminal prosecution through the criminal justice system.

If an individual commits an assault, he could be arrested without a warrant and be brought before a committing judge where a complaint must be filed and a warrant could be obtained.[42] If the person taking the

complaint feels that no warrant is necessary, a summons may be issued instead.[43]

If the offense charged is minor in nature, the municipal judge may arraign the offender and receive his plea; however, it is at this first appearance before the court following the filing of the complaint that the judge is required to advise the defendant of the existance of any Pretrial Intervention Program, and how to enroll in it.[44] It is also at this time, that counsel is assigned if appropriate.[45]

If the county has a PTI program for non-indictable offenses, and the defendant is interested in participating, he would not be arraigned until he had had the opportunity to apply for the program. If he is accepted, the case will be continued to allow participation.[46] If there is no such program in that county that matter proceeds to arraignment, plea and trial.

If the complaint charges the defendant with an indictable offense, the court must inform him[47] of his right to a probable cause hearing, his right to indictment, his right to trial by jury and whether or not he may waive indictment and trial by jury. If the county has an approved pretrial intervention program which handles indictable offenses, it is at this time that the defendant must be advised of the program and given the opportunity to apply.[48] If the offender is enrolled in the program, his case will be continued.[49]

If an indictment has already issued, the defendant is not precluded from applying for enrollment in a PTI program, assuming that it accepts indictable offenders. The defendant has 25 days after making his original plea to the indictment in which to file his application for enrollment.[50]

Thus it can be seen that the pretrial intervention program is designed to operate in most cases between the complaint and indictment or arraignment stages of the proceedings, and in those cases where an indictment is returned before the offender has the opportunity to make application, he will be given an opportunity to enroll.

C. Other Means of Disposition

In addition to Pretrial Intervention and normal trial, a prosecutor in New Jersey may utilize other procedures to handle offenders. He is, of course, at liberty to continue to use informal agreements whereby the charges are dropped on the condition that the alleged offender (1) join the armed services, (2) stay away from a certain person or area, (3) seek psychiatric or medical help, (4) enroll in Alcoholics Anonymous, or (5) undertake some other action that the prosecutor desires.

Shortly after Rule 3:28 was initially implemented

the New Jersey Legislature passed a law enacting a program for narcotic offenders.[51] This program provides for either pre-plea or pre-sentencing diversion of first time drug offenders and for expungement of their convictions upon successful completion of the program.[52]

Although not technically a diversion program, the Disorderly Persons Act has provision whereby a convicted offender may have his record cleared if he remains free of trouble for five years,[53] and there is also a general provision in the law whereby an offender convicted of any offense other than treason, misprison of treason, anarchy, all homicides, assault on a head of state, kidnapping, rape, arson or robbery, may have the record of their conviction expunged after 10 years.[54]

Another alternative means of disposition available to the prosecutor is Plea Bargaining, and this procedure has received official recognition and sanction in New Jersey by Court Rule.[55] These agreements can include provisions whereby certain offenses will be dismissed or reduced and the prosecutor will recommend a particular sentence.

From the above brief summary it is readily apparent that the legislature has not failed to act to give defendants the opportunity to avoid the stigma associated with a criminal conviction and that even without a formal pretrial intervention program, a prosecutor has at his disposal means of tailoring the severity of the criminal

justice system to meet the rehabilitative needs of the offender.

III THE HISTORY OF PRETRIAL INTERVENTION IN NEW JERSEY

The first recognizable pretrial diversion type program to gain national visibility was developed in Flint, Michigan in 1965;[56] however, this project has not been afforded recognition as the initiator of the present concept. This distinction has generally been afforded two more commonly known projects, Project Crosswords, in Washington, D.C. and the Manhatten Court Employment Project of the Vera Institute of Justice in New York City.[57] These were funded in 1968 by Department of Labor Manpower funds.

As a result of the supposed success of these initial or pilot programs, the U.S. Department of Labor and the Law Enforcement Assistance Administration (LEAA) undertook the financing of a number of "second round" programs across the country in 1971. (Atlanta, Baltimore, Boston, Cleveland, Minneapolis, San Antonio, and the California Bay Area.)[58] The concept of pretrial diversion has proven to be a popular one and was quickly endorsed by legal scholars, courts, legislators, public officials, the American Bar Association, national commissions and others,[59] but there have been a number of scholars who have begun to question the validity of the claims of success made by those who support this new concept.[60]

Such criticism does not seem to have been prevalent

in 1970 when the New Jersey Supreme Court was asked to promulgate a Court Rule allowing for the development of the Newark Defendants Employment Project (N.D.E.P.). Although other states had used prosecutorial discretion[61] and legislative action[62] as the basis for the development of their programs, it was felt that due to the ambiguities about the extent of prosecutorial discretion in New Jersey a court rule was needed.[63]

Rule 3:28 which was then called "Defendants Employment Programs", because it was intended to authorize the development of an employment oriented rehabilitation program in Newark similar to the pilot programs, was enacted in October of 1970. This court rule required approval by the New Jersey Supreme Court of any program that was developed. Only designated judges were allowed to rule on requests for admission. Otherwise the initial rule was similar to the present one in that postponement was of limited duration, and dismissal could only be achieved upon the recommendation of the program director and with the consent of the prosecutor. Termination followed by normal processing was required for those for whom such return was recommended by the program director.[64]

Whatever statistical validity existed to support the "pilot" and "second round" programs fell by the wayside in September, 1973 when Rule 3:28 was amended to allow

for programs other than those providing employment oriented rehabilitation. By the 1973 amendment, the Court made clear that drug and alcohol detoxification programs, in particular, were eligible for approval and could be operated under the amended rule.[65]

On April 1, 1974 Rule 3:28 was extensively amended and assumed its present form. It was at this time that the rule was re-titled "Pretrial Intervention Programs", and existing due process safeguards were incorporated.[66] In an attempt to insure uniform development of PTI programs throughout the state, program administration was required to be placed either under the Trial Court Administrators or the Chief Probation Officers of the counties and a coordinating unit was developed in the Administrative Office of the Courts. The first year of this unit's life was spent in developing a proposal for statewide implementation of a uniform program of pretrial intervention.[67] In December of 1974 the Supreme Court reviewed and approved a plan calling for the establishment, on an operational basis, of a unified, statewide system of PTI programs.[68]

As previously noted, the first operational program in New Jersey was the Newark Defendants' Employment Project, but contrary to what the name implies, only 55% of those taken into the project during the first four years of its existence were unemployed.[69] In fact, N.D.E.P. program was multi-problem oriented, and it

was designed to handle defendants charged with any offense.[70] It excluded only those opiate-addicted. By the end of 1973, N.D.E.P. was making rather startling claims of success, and was alleging that it had reduced recidivism to 5%.[71] Such claims would not have withstood a little healthy skepticism and close scrutiny. The figure was arrived at in the manner discussed below, and the process is illustrated here so that the reader may be assisted in evaluating claims of this program and others in the remainder of the paper.

By the end of 1973 N.D.E.P. had considered the applications of more than 1500 defendants and had enrolled 760. Note that no mention is made of the number of offenders who were theoretically eligible nor are we told how many were discouraged from applying by the restrictive admissions criteria or by the interviewer's verbal assurance that application for the program would be a useless waste of time in light of the offender's record or the nature of the pending charge.[72]

Despite the fact that 760 of the actual applicants were felt to be prime candidates for such rehabilitation, 33% of these subsequently failed to complete the program. We are not, of course, told what constituted passing or lailing nor are we told how one determines that an offender is rehabilitated. The bottom line is, of course, the 5% figure, but this is 5% of those who successfully completed the program, and even here we

are not given adequate information. We are not told what effort was made by N.D.E.P. to follow each and every "graduate", nor are we told for how long a period the "graduates" remained arrest free. This grossly unprofessional flaunting of misleading statistics is not unique to administrators and proponents of PTI programs,[73] but it is unfortunatly a wide spread and accepted practice as will later become evident.

The Hudson County Pretrial Intervention Project was the next program to be established in New Jersey and it began operations November 1, 1971.[74] Its director was Donald Phelan, who is presently the Director of Pretrial Services for the Administrative Office of the Courts for the State of New Jersey. This program was, from its inception, a broad range program that in theory was open to anyone over 18. In practice, however, individuals who had past records or who were charged with crimes of extreme violence associated with serious injury, crimes involving the dispensing of significant amounts of drugs, traffic, health code or gambling violations or those who had an indictment returned against them stood little chance of acceptance. Such exclusive criteria, you would assume, would tend to create a creaming process whereby the accepted applicants would be "good" criminals, but the program took this creaming process a step further. It established an initial review period

wherein the participant signed a "Participant Agreement," and, if accepted, was assigned to a counselor for a seven to eleven week period of informal participation for evaluation of attitude and motivation. It was only after this initial screening that the applications of those remaining were processed. In a 1½ year evaluation the figures indicate that 43.6% of the 868 actual participants were rejected during the review period, 189 were awaiting a decision, 86 remained in the program at the time of the study, and 216 had passed through the program. We are told that 153 individuals had successfully completed the program and we are told that only six had been rearrested, but we are not told how thorough the follow up was, nor are we told how long these "graduates" had been on the street. It is interesting to note that the program estimated that the cost per successful participant was $1,250.00 although no justification for that figure is provided.[75]

The next significant plateau in the growth of the concept of PTI was reached when the Supreme Court of New Jersey decided the case of State v. Leonardis, 71 NJ 85 , 363 A.2d 321 . Here the court strongly suggested that PTI programs should be established in each county declaring that such programs had proven their worth by lowering recividism and raising skill levels.[76] Although the court recognized that the goals

of PTI programs were two-fold, that (1) rehabilitation and (2) expeditious ~~processing~~ disposition, they stated, "expeditious disposition is ... subordinate to the rehabilitative function ..."[77], and that greater emphasis in deciding who should be admitted "should be placed on the offender than on the offense."[78]

In this landmark decision the court was faced with the questions of whether or not the PTI programs could presumptively exclude individuals charged with certain offenses. They declared that although no one could be automatically excluded from participation, the criteria could be set sufficiently high to assure selection of those applicants who had the best prospects for rehabilitation.[79] The court was also asked to decide to what degree the denial of an applicant's enrollment request was a matter of unreviewable prosecutorial discretion. The court, on this issue, decided to limit the discretion, and set forth standards that would have to be met by the program staff and by the prosecutors in reviewing applications. These standards were subsequently published by order of the court as the official guidelines governing all the New Jersey programs.

By the end of 1975, there were 9 pretrial intervention plans that had received the approval of the Supreme Court and were operational.[80] This figure included two separate programs in both Hudson and Camden Counties. Thus of the

21 counties, only 7 had chosen to implement the program.

Leonardis was undoubtedly intended by the court to prod the counties into developing pretrial intervention programs, but the case of State v Kourtski[81] decided October 12, 1976 was the one that firmly declared just how aggressive the judiciary intended to be in pushing this new reform. In that case the defendant was being held on charges in Somerset County which was one of the counties that had chosen not to fund a pretrial intervention program, and he asked to be removed from the trial docket until the county had an approved program. The defendant's contention was that Somerset County's failure to develop such a program denied him equal protection of the law. The trial court declared that the fact that some counties had programs while others did not was a wholly arbitrary classification which was clearly unrelated to the stated purpose of the Court Rule that established the authority for the programs in New Jersey. Consequently, it held that the defendant could not be prosecuted until a pretrial intervention program was established in that county and he was given the opportunity to apply for the program.

At the time of this decision, 15 of the 21 counties in New Jersey had received Supreme Court approval for programs, and it was obvious to the other counties that they could not long ignore the message of this decision.

By the end of 1976, three of the remaining counties

had recieved Supreme Court approval, and the Monmouth County Program received approval in July, 1977. At the end of 1977 neither Sussex or Warren County had established programs, but they were both in the process of submitting proposals.[82]

It can thus be seen that a program that is ostensibly discretionary with the individual counties has in effect been mandated by court decision with the result that in the near future each and every county will have an approved program.

IV DISCUSSION OF GOALS AND PURPOSES OF PRETRIAL INTERVENTION

The goals of pretrial intervention in New Jersey are admirable and simple. As previously NOTED, these goals are two in number and are, in the order of their declared priority,[83] rehabilitation and expeditious disposition of criminal cases.

Taking the latter first, let us consider for a moment some of the elements that underlie these apparently simple goals.

Expeditious disposition of criminal cases is achieved according to the Chief Justice of the New Jersey Supreme Court by " remov(ing) certain accused defendants from the revolving door corruption and futility of imprisonment ... ," and thus by " removing such marginal offenders from further prosecution (are) the pressures on the criminal justice calandars ... relieved and once these less serious offenders (are) eliminated from trial, the judges and prosecutors (are) able to devote their attention to important cases relating to public security."[84]

Thus there would seem to be two distinct ways in which disposition is expedited. First of all the participants case supposedly receives abreviated treatment, and secondly the processing of the more serious cases may be more expeditiously accomplished.

This theory is apparently based on two assumptions. First, it assumes that had not this participant been afforded the benefits of pretrial intervention, he would have been processed through the entire criminal justice system.

This means that having been arrested he would have been arraigned, tried, found guilty, had a pre-sentence report drawn up and been sentenced to some form of custodial or noncustodial supervision.

Soon after the guidelines for the anticipated statewide implementation of the pretrial intervention program were announced, a workshop for individuals who might become involved in the program was held in Princeton, New Jersey. The report of the workshop included an important comment which was:[85]

> PTI theory sometimes assumes that a diversion is an alternative to the imposition of more severe sanctions, but realistically only a limited number of accused persons may face the possibility of incarceration.
>
> The resources of a system are only saved to the extent that it can be shown that the participant would have gone on to impose the costs of trial and future treatment. But perhaps most pretrial eligibles would not impose these costs significantly. PTI may be used, most often, as an alternative to dismissal, fine or a suspended sentence without probation.

Other commentators have likewise noted that in the case of most pretrial intervention participants, had they not been diverted, they probably would not have been sentenced to prison, and that it is very likely that the system caseload remains the same, but that one more agency with its own substantial budget has been added to the processing.[86] The available evidence would seem to indicate that there is a good bit of truth in these comments in so far as they might be applied to the New Jersey Pretrial Intervention Program, for in all the counties reviewed by this author,[87] there was not one time when the total number of employees in the criminal justice system had

been reduced as the result of the implementation of a Pretrial Intervention Program.[88]

Of the 29,824 active cases pending in the New Jersey Superior courts as of August 31, 1977,[89] 3.3% represented defendants enrolled in a Pretrial Intervention Program that had been approved under Rule 3:28.[90] If we assume that 30% of all those who are enrolled in the program at any one time will not successfully complete the program and have their charges dismissed,[91] we see that 2.3% of the pending active cases will result in a dismissal because of the pretrial intervention program.

Between September 1, 1975 and August 31, 1976 the rate of dismissals among cases disposed of in Superior Court was a twelve year low of 26.3%,[92] and for the same period during the following year the rate jumped to 30.1%.[93] Obviously the whole difference cannot be attributed to the Pretrial Intervention Program for, as noted, during this period only 3.3% percent of the defendants were involved in the Pretrial Intervention Program and only 2.3% would have had their charges dismissed.

In fact the effectiveness of the pretrial intervention program must be seriously questioned when one views the crime statistics for the state over the last 10 years.[94] As following chart clearly illustrates,[95] between 1967 and 1975 approximately 14 to 15 percent of of all those arrested for Crime Index Offenses were never brought to trial, but the 1976 figure shows a decrease in this area to 10%.

TABLE SHOWING PERCENTAGE OF THOSE ARRESTED FOR C.I.O. BUT NOT CHARGED

1968	1969	1970	1971	1972	1973	1974	1975	1976
13	16	15	13	15	17	15	14	10

Thus it can be seen that for the same period that Pretrial Intervention Program began to divert a reportable percentage of cases, the police and prosecutors were diverting informally a significantly lower percentage of cases prior to trial. As previously noted, although Pretrial Intervention Programs have been operating in New Jersey for almost eight years now, it is only within the last two years that they have been a significant factor in most counties[96] and could be expected to have had any noticeable effect on the state-wide statistics.

Based on the above figures, it would not seem to be unfair to suggest that Pretrial Intervention is not resulting in any significant increase in the total number of offenders being diverted from the criminal justice system, but instead it is causing those who would have been informally diverted to be formally diverted at a later time.

The second assumption that is inherent in the theory that Pretrial Intervention expedites disposition and thus conserves criminal justice resources is that the treatment and processing that is afforded the PTI participant is less in amount and cost than that which would have been afforded him had there not been a Pretrial Intervention

Program.

As previously mentioned, there is a strong possibility that a significant percentage of pretrial intervention participants would have had their charges dismissed informally under the pre- PTI policies. If we assume that such is not the case, we must still consider the fact that historically in New Jersey in excess of 80% of the criminal cases tried in Superior Court are disposed of through guilty pleas.[97] Only 37% of the sentences awarded in County and Superior court result in incarceration[98] and only 25% result in probation.[99] In light of the screening procedures that are applied to all pretrial intervention applicants, it would seem to be a justifiable inferance to say that few if any pretrial intervention participants would have been arraigned, plead not guilty, and been incarcerated or subjected to a probation program involving as much supervison as they receive in the pretrial intervention programs.[100]

In evaluating the relative savings of resources, it is not only necessary to look at the resources that would have been expended in processing the participants under previously normal methods, but it is also necessary to look at the resources now being devoted to all phases of the program.

Previously if an individual was of a type who might be eligible for a reduction in charge, a partial or full dismissal or other informal diversionary practices, his counsel would approach the decision maker and propose such

a solution; or very possibly the police or prosecutor on their own would make a conditional offer. The resulting informal agreement might be to the effect that if the defendant would (1) stay out of trouble, (2) join the armed forces, (3) seek psychiatric help, (4) leave town, or any other number of other possible conditions, the charges would be reduced or dismissed. If the prosecutor or police were unwilling to go along with the agreement, then the defendant proceeded to trial. There was no appeal from this procedure, and little if any government effort was expended.

If we assume that approximately 15 % of those arrested are going to be released without an adjudication of guilt, it would seem that from a cost effectiveness viewpoint, this was an extremely efficient system. The informality of this procedure that makes it so efficient is, however, viewed by many as the principle weakness of the procedure;[101] and a great deal of debate has gone into the issue of whether or not vesting such discretionary power in the police and prosecutors is justified and constitutional.[102]

Pretrial diversion is, as noted, a formalized procedure which is intended to make this procedure more visible and consequently, it is assumed, more equitable. Unfortunately, as is so often the case, such formalization means paper, people and procedures, and these all cost money.

The Administrative Office of the Courts which is charged with the responsibility of administering and

coordinating the pretrial intervention programs throughout the state has 22 standardized forms that they distribute to each approved program. Among these are a Notice of PTI program existance form (english and spanish), a referral form with 14 questions, an initial interview form with 53 questions, a health survey with 59 responses required and many other detailed reports and forms. There is simply no way short of counting to determine how many local forms are being used.[103]

Every offender must be advised of the existence of the PTI program,[104] and if he is interested, he will be referred to an initial interviewer. After a series of checks are run on the information gathered, his application with accompanying paperwork will be forwarded to the program director for approval, then to the prosecutor for approval and finally to the judge. If the program director or the prosecutor does not think diversion appropriate, but the offender disagrees, then the court will hold a hearing to determine if these officials have abused their discretion by denying enrollment. Should the defendant disagree with the Court's decision, the defendant may seek leave to appeal to the Appellate Division of the Superior Court or even to the State Supreme Court. In light of the fact that there are equal protection and due process questions involved, it is not inconceivable that we will one day see an appeal relating to pretrial intervention in the Supreme Court of the Unites States. This entire procedure is

an additional burden on the criminal justice system that is not present in an informal diversion program. Since the New Jersey program is available to all defendants, this would seem to be an excellent opportunity for a defense counsel to exercise dilatory tactics,[105] if such would be to his clients advantage. What defense counsel who is representing a first time, minor or medium severity offender would be representing his client's interest to the full extent allowable under the law if he did not try to get that client into a program whereby the conviction would be avoided? I suggest that if the stigma of conviction is as real as some people contend, the answer to that question must be that every responsible counsel will feel that he must have his client apply and appeal any denials. There will of course, be monetary considerations and "informal understandings"[106] that keep applications down, but nonetheless, there have already been enough appeals for this consideration to have become a real factor.[107]

There are other pretrial activities that consume time. The initial referral, the interview and the investigation of each and every applicant imposes a burden not present under the other system. The supervision and counseling of those informally and formally enrolled consumes a majority of the staffs time. Even if one postulates that all of the services being provided to the participants would have been provided as post-

trial services under the old system, (an assertion that is, as previously noted, extremely questionable) one must consider the fact that the 30% - 50% who are rejected or terminated will end up being processed through the system and receiving a full post-trial dose of"rehabilitation." For those terminated then, this effort is (to some extent, anyway) redundant.

It is apparent then that the pretrial intervention concept as practiced in New Jersey has within it numerous resource consuming elements not present under the previous informal system. Investigation, partial delivery of services to individuals eventually rejected or terminated, and formalized admission, rejection, termination and dismissal procedures are just some of the more obvious elements. In evaluating whether or not the criminal justice system as a whole is benefited and the disposition of offenders has been expedited, these elements must be considered.

If pretrial intervention is to become a viable alternative, it would seem that it must base its foundation on firmer ground than resource conservation. In New Jersey the Supreme Court has declared that the primary goal of PTI is rehabilitation, and therefore it is important to review factors affecting this goal.

Probably the first question that must be answered

here is,'what constitutes "rehabilitation"?'. Webster defines the term as "the action or process of being... rehabilitated: as ...the reestablishment of the reputation or standing of a person...or the process of restoring an individual (as a convict, mental patient or disaster victim) to a useful and constructive place in society through some form of vocational, correctional or therapeutic retraining or through relief, financial aid or other reconstructive measure."[109]

Accepting this as the commonly understood meaning, it would appear that certain elements are necessary to achieve rehabilitation. First of all, before a man's reputation or standing can be re-established, it must be shown that among those who were aware of his reputation or standing prior to his transgression, he had a better reputation or standing than he presently has. I feel that it is sufficiently well recognized as not to require documentation that in certain segments of society an arrest and often even a conviction will enhance rather than diminish an individual's reputation and standing. It would seem then that for these individuals their reputation and standing has not suffered and they need not, for this reason, be "rehabilitated."

The second part of the definition concerns restoring one to a useful and constructive place in society. If in this case we use restore to mean re-establish, it seems obvious that one must previously have held

a useful and constructive place in order to be returned to that level.

Pretrial Intervention in New Jersey has as one of its purposes the avoidance of stigma. It thus would seem to be philosophically in tune with that part of the definition that concerns the re-establishment of reputation and standing, at least for those elements of society where arrest and conviction convey stigma. It must be recognized that this goal could be, and in fact is being, more efficiently and just as effectively accomplished through dismissal. It is doubtful that in the majority of cases the program is designed to restore an individual to a useful and constructive place in society. The term "habilitate" is more in keeping with the true goals of the program. As originally conceived, the program was aimed at the unemployed and the under-
110
employed, and the intent was to give them something which they did not previously have, i.e. meaningful employment. In order to avoid confusion, throughout the paper I will continue to use the term "rehabilitate," but the reader should bear in mind that often "habilitate" would be more appropriate.

Once we understand what rehabilitation is, how do we know when an individual has, in fact, been rehabilitated? If we were to use the dictionary definition it would not be beyond the realm of logic to assume

that with careful investigation we could find out what a man's prior reputation or standing was and take steps to eradicate any blemishes that might have tarnished and lowered his reputation and standing. Pretrial intervention would not be necessary to accomplish this.[111] Likewise, using the true definition, we could ascertain what his employment or emotional situation was prior to the offense and give him services or treatment to restore him to his prior situation.

The problem is that, in fact, the concept of PTI is not designed to restore an individual to his prior status, but rather it attempts to change the individual and to give him the tools to achieve a new status,[112] and it is here that the dilemma arises. How does one determine when a man has truly realized that crime does not pay? How does one tell when he has achieved social awareness and respect for the rights of others? How can one be sure that a man has achieved the self-discipline and pride necessary to hold a job and advance on the ladder of success? If the results of the many studies that have been done on probationers and parolees are to be believed,[113] there simply is no way to make these determinations.

What, then, are we to use to determine when a person in rehabilitated? The proponents of PTI have devised an extremely simple, albeit irrelevant, indicator.[114] The Chief Justice of the Supreme Court of New Jersey has said that the "true test (of the programs effectiveness)

of course is measured by recidivism, that is, rearrest after successful program participation."[115] If a program participant is subsequently arrested does it mean that at the end of the program he had not re-established his reputation or standing? Of course not! Does his subsequent arrest mean that at the end of the program, he was not restored or elevated to a useful and constructive place in society? Of course not! Likewise, if he is not the one in five[116] who is caught for committing a crime, does it mean that he has in fact been "rehabilitated"?

The truth of the matter is that we do not now have, nor are we likely to find an accurate means of determining when a person has been habilitated or rehabilitated and, if the proponents of PTI and other reform movements would admit this, they might gain in credibility what they would loose in self-sanctity.

Once we recognize that pretrial intervention is not, or at least does not appear to be, cost-effective in and of itself, and we acknowledge that we do not pocess the wherewithall to determine if it truly habilitates or rehabilitates, we are left with the question of whether or not there is a useful place in the criminal justice system for this reform.

Crimes and criminals can be regarded as being involved in a continuum that advances between extremely petty, victimless crimes to vicious crimes against

persons and property.[117] Traditionally in the United States, it has been within the police and the prosecutors' discretion to give deserving individuals "a break" and not to charge and prosecute them for the lesser offenses. There does not seem to be much disagreement even among the more liberal or pacifist elements of our society, that those who commit the most serious offenses should be prosecuted and punished.[118] It is when operating within that large grey area between the extremes that the police and the prosecutors find their judgements to be questioned, and it is within this area that a realistic pretrial intervention program can find compatibility.

If a first offender commits an offense in the lower segment of the continuum there is really little, if any, need for "rehabilitation." The arrest and threat of prosecution will undoubtedly have some effect on the individual, and assuming that restitution or satisfaction can be given to any victim involved, society would not seem endangered by dismissing this individual without submitting him to a formalized PTI type program or criminal prosecution. If the avoidance of stigma is a legitimate aim of a criminal justice system,[119] it does not seem inappropriate to allow offenders in this area to enjoy that benefit.

On the other hand, if the offender has previously failed to respond to such lenient treatment, or if there

has been a serious crime committed which evidences a need for extensive rehabilitative or habilitative services, the limited scope of PTI will not satisfy the requirements, and society would not gain the protective benefits from its criminal justice system that are usually regarded as the prime objective of the system. The stigma associated with this type offense is part of the punishment and should not be eliminated.[120]

To provide pretrial intervention services to those within the lower group would be wasteful, for the group needing rehabilitation the least would recieve unneeded services; however, if we are to use recidivism as our evaluator, it would seem likely that a pretrial intervention program for this category would prove an unmitigated success.

To provide PTI services to the upper group would be to provide an ineffective service to the group that needs help the most, and if we were to use recidivism as our evaluator, there is little doubt that the program would be classified a gross failure.

If pretrial intervention is to be effective, it must operate above the level where stigma and harm are limited in quantity but below the level where realistic appraisal indicates that society's interests in security will not be satisfied.

Pretrial Intervention can serve as another alternative to prosecution in that it allows a degree of

continuing supervision over those who previously had to be let go or prosecuted. Under a realistic pretrial intervention program, the prosecutor has a third choice, for he can retain control over the offender without jeopardizing his case for a longer period in order to enable him to make a more informed judgement as to the appropriate ultimate disposition.

V. LEGAL ISSUES

> The concept of pretrial diversion has emerged within recent years as a major issue in the ongoing debate over solutions to one of our most perplexing social problems, the soaring crime rate. The promise of a more humane system of criminal justice to solve this problem has given added impetus to diversion's popularity.
>
> .....
>
> Amidst a flurry of recent studies indicating diversion can be successful in reducing recividism, scant attention has been given to its legality. Traditional principles concerning judicial supervision, assistance of counsel, the right to a speedy trial, and the privilege against self-incrimination which inhere in the regular criminal process, have been glossed over in the haste to implement a promising new concept.[121]

A. General Comments

These comments, when made, were certainly true, but since that time many of the legal issues inherent in pretrial diversion have been analyzed by commentators, and although the legal periodicals are by no means saturated with scholarly reviews, there has been enough activity in this area to illuminate many of the more significant issues.[122]

As originally implemented, the New Jersey Defendant's Employment Programs had many of the equal protection and due process short-comings recognized by the comentators, but, as previously noted, on April 1, 1974 R 3:28 was extensiveny amended, retitled "Pretrial Intervention Programs," and equal protection and due process safeguards were incorporated.

The enactment of these amendments did not, however,

resolve all of the issues. The court rule provided for procedures to be utilized in "counties where a pretrial intervention program is approved by the Supreme Court for operation...", and it did not forbid the operation of non-approved programs without the protections afforded by the approved programs. Although this "loophole" remains, there are no known unapproved programs operating or planned in New Jersey at this time, and it is doubtful that the courts would allow a competing informal program to exist.[123]

In August of 1974, J. Gordon Zaloom, Esq., Chief, Pretrial Services, State of New Jersey, Administrative Office of the Courts, Division of Criminal Practice, wrote a detailed set of proposed guidelines for the expected state-wide implementation of pretrial intervention that was submitted to the Supreme Court in September of 1974.[124] That Mr. Zaloom's article significantly influenced the guidelines that were eventually accepted cannot be doubted, for the order adopting and promulgating the official guidelines incorporated almost verbatim much of the reasoning contained in that article,[125] and sections of the proposals have been frequently and favorably referred to by the Supreme Court.[126]

In State v Leonardis I,[127] the court set out standards that were subsequently published by court order in November of 1976, and these guidelines, as interpreted by court decisions, when read in conjunction with the

enabling rule, moot many of the issues raised by the commentators about individual rights under pretrial diversion programs.

Under the guidelines every defendant who has been accused of any crime[128] is supposedly eligible for admission into a pretrial intervention program. This policy, if adhered to, would obviate the need to discuss the equal protection arguments applicable to programs that have restrictive requirements, but as later shown,in practice, many programs in New Jersey appear to have "de facto" restrictions.[129]

Guideline 4 specifies that "Enrollment in PTI programs should be conditioned upon neither informal admission nor entry of a plea of guilty. ..." and thus the legality of a requirement that the defendant plead guilty or informally admit culpability will not be addressed herein. Suffice it to say, that some programs in other states have such a requirement while others do not forbid it, and there seem to be strong arguments available to support such a requirement.[130]

Guideline 5 provides that "No information,....., obtained as a result of a defendant's application to or participation in a pretrial intervention program should be used, in any subsequent proceeding, against his or her advantage. As interpreted by the New Jersey Courts,[131] this effectuates a strict measure of confidentiality

and avoids problems raised by some commentators.[132]

Guideline 8 provides that the"decisions and Reasons therefore made by the designated...(decision makers) in granting or denying...applications..., in recommending and ordering termination from the program or dismissal of charges...must be reduced to writing and disclosed to defendant." Furthermore, this guideline allows the applicant the opportunity to challenge a decision denying entry, or a decision to terminate him and have his case handled in a normal manner. The issues as to whether or not the defendant must be advised of the basis for adverse decisions and afforded the opportunity to contest them at a hearing have been settled; however, as will be seen later, there remains the question as to whether or not the procedures provided fully satisfy due process requirements.

B. Seraration of Powers

Before addressing the legal issues as they relate to the rights of the individual under PTI, it seems appropriate to answer two questions raised by the Chief Justice.

1. Does the court rule invade the exectutive authority of the prosecutor?

In answer to this question the Chief Justice said: "No - for the Supreme Court has decided the prosecutor has virtually untrammeled authority, essentially a

veto power - except on cases of arbitrary abuse."[133]

The truth of this statement is questionable. First of all the lower courts in New Jersey have decreed that should a county prosecutor not establish a program, it would constitute a denial of equal protection for the defendants charged within the county,[134] and the Supreme Court has issued an order implementing mandatory guidelines for all approved programs.

The prosecutor does not have "untrammeled authority" to restrict his allocation of resources to certain offenders or certain offenses.[135] He does not have the authority not to establish a program. He does not even have the authority to admit participants to his program, for he must seek an order from the court granting such admission. Should he desire to deny admission, he may do so, but his action is subject to appeal. He may not terminate an unsuccessful participant, but rather he must ask the court to do so. In fact, in Leonardis I,[136] the court declared that by limiting the "virtually untrammeled authority" previously exercised by prosecutors, due process objections to the admissions procedures were met.[137]

Under non - PTI procedures a prosecutor can divert without giving a written reason and basis therefore. He can refuse to divert and his decision is virtually unappealable, or he can proceed with prosecution if the

defendant fails to adhere to an arrangement without having to justify his reasons. Regardless of the standards used in evaluating the program directors and prosecutors actions, the mere existence of judicially imposed procedures and review constitutes an infringement into the executive domain. Whether or not such infringement is desirable is not the question. It is in fact an infringement contrary to the Chief Justice's remarks.

Following the Supreme Court's decision in Leonardis I, the Attorney General filed notices of motions to intervene as amicus curiae to obtain an extension of time in which to file a petition for clarification and for a stay of judgement. The court granted the motion on September 8, 1976 allowing for a rehearing to consider the question of the Court's authority to order diversion of a defendant into pretrial intervention when and if a prosecutor refused to consent to diversion. At that time the court directed the parties to consider whether, in light of the doctrine of separation of powers, the Court had the power, either before or after indictment, to divert a defendant over the prosecutor's objection pursuant to either its rule-making or adjudicating powers. Briefs were submitted by the Hudson County Prosecutor, The Public Advocate and the Attorney General. The Court entertained briefs fron the Trustees of the Bergen County Bar Association and Judge Evan Kushner, Presiding Judge of the Municipal

Court of Paterson, and also allowed the Passaic County Prosecutor to rely on his brief previously filed.[138]

As to the interpretation of state law and the state constitution. the State Supreme Court has the absolute power to rule finally, and it is therefore their decision as to whether or not they have infringed upon the domain of the Executive Branch which is controlling. Since the earliest days of the state constitution, the Supreme Court has been involved in an ongoing dispute with the Legislative Branch over the issue of whether or not the Supreme Court rule making powers in the area of practice and procedure are subject to Legislative control.[139] The full ramifications of this dispute will be discussed later in that part dealing with Judicial infringement on legislative prerogatives. It will suffice to say at this point that the Court has jealously guarded its rule making power.[140]

The court has declared that PTI is "a procedural alternative to the traditional system of prosecuting and incarcerating criminal suspects,"[141] and thus is within the practice and procedure over which their rule-making power extends.[142]

It is unfortunatly true that "in the long run there is no guarantee of justice except the personality of the judge,"[143] and that "Whoever hath an absolute authority to interpret any written or spoken laws, it is

he who is truly the lawgiver, and not the person that first spoke or wrote them."[144]

One commentator in commenting on the New Jersey Supreme Courts holding in connection with the leading case interpreting its rule making powers noted:

"The ambiguous qualities of the expression 'practice and procedure' must be considered. The question of the proper limits of procedure for rule making purposes may be baffling, but ordinarily the courts answer is not final; if the court answers it unwisely, as by attempting to manage a subject more suitable for popular than judicial control, the answer can be corrected by the legislature. Under the (holding that the rules are not subject to legislative control) the court's answer is fraught with larger consequences, for the court that exercises rule making power and also defines its limits has declared that its rules cannot be overridden by legislation."[145]

It is certainly an arguable point as to whether or not the judicial branch has the power to establish "procedural alternatives to the traditional system of prosecuting offenders," but when they are the sole judge of the validity of their claim, who can doubt the answer. Can they also claim that they can "decriminalize certain offenses,"[146] effect police discretion not to charge, establish "rehabilitative" and social services as alternatives to traditional prosecution? If they are the sole judge of whether or not an area falls within their rule making power, what will become of the supposedly co-equal branches of the government?

It would seem that the opinion that pretrial intervention as "a procedural alternative falls within the

practice and procedure over which (the) rule-making power extends" is based on the assumption that pretrial intervention has solved many of the procedural problems facing the judicial system.[147] In support of this view, the court refers to its prior reliance on an authors law review comments and its own conclusionary remarks that:

> Pretrial intervention provides one means of addressing the problems of congestion and backlog of cases which currentlyconfront our prosecutors, public defenders and courts. To the extent that a PTI program averts the costs of processing these cases, it also permits a more efficient use of the limited resources available to law enforcement authorities.[148]

The court gives no basis for these bald conclusions, and indeed,as previously discussed, logic and statistics would seem to indicate that in fact PTI is an additional appendage to the system that simply causes the limited resources to be spent in a different manner. In 1976 there were a total of 335,330[149] arrests in New Jersey and 274,169 of these (82%)[150] resulted in charges. During the same period there were 2502 people enrolled in Pretrial Intervention programs.[151] 2041 of these individuals successfully completed the programs.[152] Thus approximately 7/10s of one percent of all those charged with offenses in New Jersey during 1976 were handled through Pretrial Intervention Programs. In light of the fact that these were less serious offenders, 80% of whom would probably have pleaded guilty,[153] it is difficult to see how this program can be said to relieve congestion and backlog in the courts. Very simply stated , there is no basis for the claim that the court is justified

in implementing such a program because of the effect it will have on the system.

After the court declared that the program does not encroach upon the powers delegated to the executive and legislative branches of the government, the court went on to attempt to explain the reasoning behind this conclusion. Regarding the executive branch, the court noted that " the constitutionality of the enabling court rule provides the essential foundation for mandating judicial review of determinations made pursuant to that rule."[154] Up to this point in the decision, however, the court had only discussed constitutionality vis a vis the legislative branch. In essance, what the court was saying was " since we can create the program without infringing on legislative prerogatives, we can force the prosecutor to participate in it without encroaching on the executive branch." The rational behind the courts position is not apparent, and it is never explained.

In Leonardis II the court specifically held that its "rulemaking power must be held to include the power to order diversion of a defendant into PTI where either the prosecutor or the program director arbitrarily fails to follow the guidelines in refusing to consent to diversion. Conversely, where the program director or the prosecutor would subvert the goals of the program by approving diversion, meaningful judicial review must also be cognizable."[155]

Even if one concedes the point that the court has the

power to establish an alternative to prosecution in order to avoid congestion and backlog, it does not follow that they have the power to order the prosecutors to use this alternative.

At another point in the Leonardis II decision, the court, once again relying on conclusionarylabels, declares that the decision to divert a defendant into PTI is functionally a "quasi-judicial decision" and this leads the court to proclaim " this conclusion desolves any argument that by ordering a defendant into PTI a court would be violating the separation of powers doctrine.[156] The courts sole authority for this position is its similar remarks in the earlier Leonardis decision, and the reader is left to speculate as to why the decision is "quasi-judicial" rather than prosecutorial.

Showing considerable good judgment , the court then abandons its efforts to justify its actions under its rule-making powers, and it wisely moves on to consider its authority for establishing the program under its inherent adjudicatory powers. Here the court started off on firmer ground by citing numerous authorities to support its position " that the courts have ample authority under their adjudicatory powers to review prosecutorial decisions where there is a showing of patent or gross abuse."[157] The court correctly noted that even if a diversion decision did not entail the exercise of a " quasi-judicial" power, review would be consistant with the traditional role that the courts have exercised in safeguarding individual rights

from abusive governmental action.[158]

Unfortunately the court did not remain on this firm ground, for it returned to discussing "quasi-judicial" power arguing that to allow a prosecutor to have a pretrial intervention program that was not controlled by the courts would be to give the prosecutor more control over offenders than they had prior to the adoption of pretrial intervention. The court stated that this would pose the threat of expanding governmental control over individuals suspected, but not yet convicted, of committing crimes.[159]

It must be conceded that a program of diversion that makes the ultimate disposition of the offender depend on whether or not he will accept specified rehabilitative services does give the prosecutor more formalized control than he previously had, but unless we are to ignore long-standing informal diversion programs, we cannot assume that quantitatively he has acquired more control. The fact that his control has become more structured and visible could be an indication that his previously untrammeled discretion has been restricted and his control over the alleged offender has been lessened.

If it is a fact that pretrial intervention does result in "an expansion of governmental controls over individuals suspected, but not yet convicted, of committing crimes", is it any less of an expansion because the program was conceived by and is controlled by the judiciary rather than the prosecutor ? Arguably the possibility of abuse of this

expanded control will be greater when the power is exercised by the executive branch rather than the judicial branch, but the amount of the control will remain the same.

Having decided that the establishment of the program and the supervision of the prosecutor pursuant to Rule 3:28 did not unconstitutionally infringe on the executive domain, the court went on to discuss the anticipated scope of the review, and it is here that the court seems to retreat. Having proclaimed its power to act, it declares its intention to exercise great restraint.

In the section of the Leonardis II decision discussing possible infringement by the judiciary upon areas reserved to the legislature, the court noted:

> Equally important, we should not expect the Judiciary (emphasis added) or the Legislature will engage in a test on the limits of their power. As Chief Justice Weintraub noted in Busik v Levine:
>
> A coordinate branch should not invite a test of strength by proclamation. Our form of government works best when all branches avoid staking out the boundaries that separate their powers.[160]

In light of a recent lower court decision that had mandated the establishment of a program in Somerset County,[161] this caution by the Supreme could easily have been a warning to the lower court judges to refrain from taking similar action. Judicial restraint in this area would undoubtedly contribute to a more harmonious working relationship with the other branches of the government, for it is one thing to have the judiciary make available to a coequal branch of the government an alternate to prosecution, but it is quite another to have them order the other branch to utilize this

service.

In setting forth the standards to be utilized by the courts in reviewing the exercise of prosecutorial discretion, not to divert an offender, the Supreme Court imposed strict standards:

> While judicial review is consistant with applicable principles nuder the separation of powers doctrine, we are of the opinion that the scope of such review should be limited. ...
>
> We are mindful of the prosecutors duty to enforce the law and the Legislature's authority to proscribe certain conduct and fix penalties for violations. Accordingly, great deference should be given to the prosecutors determination not to consent to diversion. Except where there is such a showing of patent and gross abuse of discretion by the prosecutor, the designated judge is authorized under R 3:28 to postpone proceedings against a defendant only where the defendant has been recommended for the program by the program director - with the consent of the prosecutor.[162]

The court further stated that "the guidelines promulgated pursuant to (their) decision in Leonardis were intended to establish a heavy burden which the defendant must sustain in order to overcome a prosecutorial veto of his admission to PTI," and that "(a)ccordingly these guidelines should be interpreted to require that the defendant clearly and convincingly establish that the prosecutors refusal to sanction admission into the program was based on a patent and gross abuse of his discretion."[163] Finally the court further enhanced the prosecutors position by stating:

> In passing it may be noted that Guideline 3 provides that any defendant charged with a crime is eligible for enrollment in a PTI program. In other words, every defendant is entitled to consideration.

> However, the prosecutor's refusal to consent or the court's denial of a diversion order may, where appropriate, be based solely on the nature of the offense charged.[164]

It is thus apparent that as to the decision not to divert, the prosecutor apparently has the same latitude that he had prior to the enactment of R 3:28. The court specifically declined to consider what procedures are necessary when a prosecutor desires to terminate a defendant's participation in PTI. The argument for judicial review of a prosecutor's decision to take a benefit away from a participant would seem to be stronger than that for the initial decision to grant the benefit, and these considerations will be covered later in this paper.

Before leaving this area, it should be noted that although the court claimed the power to control the authority to review the prosecutor's decision to admit participants in order to limit his ability "to subvert the goals of the program," it did not specify the scope of this review,[165] nor does the decision deal with the situation, which is far more common than PTI, where the prosecutor simply declines prosecution.

Although the remarks of the Chief Justice fail to consider all the aspects of the potential judicial infringement on prosecutorial discretion, at least as to the decision not to divert, they would seem to have a basis in fact.

2. Is this program compatible with legislative policy?

To this the Chief Justice answered: "It is. The Legislature in 1971 adopted such policy with regard to drug offenses and I have no doubt, particulauly in view of the economic benefit to the taxpayer, would put its stamp of approval on the whole court policy. The Federal Congress is also considering such diversion programs."[166]

At the time of the Chief Justice's speech, pretrial intervention programs had been operating in New Jersey for over six years. Certainly, if the legislature was anxious to "put its stamp of approval" on the program, they had had ample opportinity to do so. Although it was true at the time that "the Federal Congress is considering such pretrial diversion programs,"[167] the same was true in 1973 when Chief Justice Richard J. Hughes, (then Chairman, American Bar Association on Correctional Facilities and Services) advocated the passage of legislation in the hearings on the federal diversion program.[168] To date there has yet to be a milti-problem oriented pretrial diversion program initiated by the federal government. It thus seems somewhat presumptuous to assume that if given the opportunity the legislature would "put its stamp of approval" on the New Jersey program. They have been given the opportunity and they haven't.

The Chief Justice's assumption is further weakened

however, by the fact that on January 31, 1975 the Prosecutor Discretion Act of 1974 was introduced into the legislature, and on January 19, 1978 a revised version was re-introduced and is presently before the Judicary Committee.[169] This bill permits the prosecutor to refer persons charged with certain offenses to a program of supervisory treatment prior to trial. Under the bill this power is exclusive to the prosecutor.

Finally, there is presently before the legislature a resolution which proposes an amendment to the Constitution to establish the responsibility of the legislature to provide an efficient system of justice,[170] and another proposing an amendment to the constitution that will cause the rule making powers of the State Supreme Court to be subject to the laws enacted by the legislature.[171]

The failure of these amendments and bills to pass might well indicate that there is insufficient support to overturn the judiciary's action, but this is a far cry from the inference made by the Chief Justice. It has long been recognized that, it is the function of the legislature to define classes of offenses and to specify how each class is to be treated,[172] and it has been stated that ideally the paramount role in the development of pretrial intervention programs should be assumed by the legislature.[173]

In implementing R 3:28 and the accompanying guidelines

there can be no doubt that the courts have attempted to modify the legislature's determination of what constitutes criminal behavior and how such behavior should be dealt with. The court has declared the purpose of pretrial intervention include: "To provide defendants with opportunities to avoid prosecution..., to provide an alternative to prosecution for defendants who might be harmed by the imposition of criminal sanctions as presently administered..., to provide a mechanism for permitting the least burdensome form of prosecution possible for defendants charged with"victimless" offenses."[174]

In the text accompanying the guidelines we are told that"diversion in appropriate circumstances can serve as sufficient sanction to deter further criminal conduct, that the use of PTI provide a mechanism for minimizing penetration into the criminal process for broad categories of offenders accused of 'victimless crimes'...while statutes proscriptive of such behavior remain in force and that PTI provides for removing from ordinary prosecution those who can be deterred from criminal behavior by short term rehabilitative work or supervision."[175]

What does or does not constitute a sufficient sanction to deter further criminal behavior is in the first instance up to the legislature, and by long standing tradition, the prosecutor. If the legislature

proscribes conduct, and the executive branch desires to prosecute, it is not within the province of the judicial branch to provide defendants with opportunities to avoid prosecution, to provide an alternative to prosecution for defendants who might be harmed by prosecution or to de-criminalize certain classes of offenses.[176]

The Supreme Court of New Jersey has held, however, that they do not feel themselves bound by legislative inaction,[177] and as evidenced by this program, they have no hesitancy to fill the legislative void when they deem it appropriate.

Through the action of the judiciary, the counties have been required to fund, thorugh the probation departments, programs that many of them apparently did not want.[178] To allow the judicial branch of the government, which is non-responsive to the electorate, to develop and fund a state-wide operational program of this magnitude is at the least poor policy and very possibly unconstitutional.

In the development of this program no hearings were conducted wherein opposing views were heard,[179] no consideration of record was given to less onerous alternatives, nor were the representatives of the people allowed to decide how best to allocate limited resources. There is no legislative history to look to in order to ascertain the intent of the rule, and although we are told that

certain sources were considered in devising the guidelines, we are cautioned that they were "not necessarily followed."[180]

There are certainly strong arguments that could be made to the effect that this rule unconsitiutionally infringes on the executive and legislative branches, but where would these complaints be heard? Will the opposing party receive a "fair and impartial" hearing when the alleged offender sits in judgement? The framers of the constitution were wise when they adopted the provisions relating to the separation of powers, and it is obvious that at the vary least the present pretrial intervention program in New Jersey unnecessarily strains this basic concept to the breaking point.

As noted in the preceeding subsection, the Court has considered the constitutionality of R 3:28 and,not surprisingly, they found it to be constitutional.

That the Court has the power to make rules concerning the practice and procedures in all the courts of the state cannot be doubted. Although the Court declared soon after its creation that its rule-making power in the area of practice and procedure was not subject to legislative control,[181] certain commentators and judges have found fault with the authoriries the court used to support its determination.[182] This author is of the opinion that the State Constitution makes the rule-making power as it relates to practice and procedure subject to legislative control; however, this issue is not relevant

here for there is no conflicting legislation.

The question is whether or not the courts determination that they have the power to devise and implement procedural alternatives to the traditional system of prosecuting and incarcerating criminals is valid. They attempt to base this power on the fact that pretrial intervention solves many of the procedural problems facing the judicial system, and thus it falls within their power to regulate practice and procedure; however, their conclusion, as previously shown, has no factual support.

The Court argues that inherent in the judicial power is the judiciary's authority to fashion remedies once its jurisdiction is invoked,[183] but it fails to deal with the problem presented by the fact that it is usually felt that the mere charging of an individual through a complaint and summones is not thought to invoke the jurisdiction of the court.[184] The court apparently recognized this distinction when it directed the parties to consider, in light of the separation of powers doctrine, the courts power before and after indictment;[185] however, the court never addressed this issue in its opinion. The courts decision seems to indicate that its powers before and after indictment are the same.

It is one thing to say that once a court has jurisdiction and has made its findings, it may form an appropriate remedy, and it is an entirely different thing to say that once the legislature has proclaimed

certain activity to be criminal, the courts can create alternatives to prosecution, provide opportunities for defendants to avoid prosecution or [redacted] simply decriminalize what it believes to be victimless crimes.

Although at times the Court attempts to strike a concillatory tone, there can be no mistaking the fact that they believe that the legislature does not have the power to do away with the court administered Pretrial Intervention. Regardless of what one might feel about the validity of the courts position, it must be remembered that it is they themselves who are the final judges of its correctness. The likelihood that the scope or the nature of the pretrial intervention program in New Jersey will be substantially effected by other than court rule is remote indeed.

C. Individual Rights

There are numerous individual constitutional rights that are effected by the New Jersey Pretrial Intervention Program. These include equal protection, due process, speedy trial, right to confront witness, right to a probable cause hearing and right to effective assistance of counsel. A discussion of the interrelationship of these rights and the procedures and practices of the program follows:

1. Equal Protection

There are two areas that will frequently

raise equal protection questions in a program similar to New Jersey's. They are: (1) since the enabling rule applies throughout the state, must a county implement a program in order to avoid denying offenders within its jurisdiction equal protection, and (2) must a program developed within a county be multi-purpose oriented, or may the program restrict its efforts to offenders in certain problem areas?

In addressing both of these questions, it is necessary to apply the correct criteria. If there were a suspect classification based on wealth, religion, race or sex, the state would have to show a compelling state interest,[186] but if no suspect classification is involved, the state need only show that although the program might discriminate against persons similarly situated, it is rationally related to a legitimate state interest.[187]

Although some of the early programs excluded female offenders, none now do, and it would thus appear that no suspect classification is involved.

In connection with the first question, it must be noted that the rule merely permits the establishment of a program, and it does not require such action. One commentator[188] referring to a Supreme Court decision wherein the Court upheld varying county criminal procedures on the ground that these procedures were discretionary with the counties, submitted that a county's failure to adopt a program under the New Jersey rule would not

constitute a denial of equal protection.[189] The previously referred to Superior Court decision of State v Kourtski,[190] and the passage of time which has seen the development of programs in all counties would seem to have made this question only of academic interest. The programs, as will be shown, are not identical, but the rationale of Salsburg[191] would seem to avoid any problems. The correctness of the Kourtski decision will not be addressed herein.

This leaves unresolved the other facet of the equal protection issue, that being, must a program developed within a county be multi-purpose oriented, or may the program restrict its efforts to certain problem areas and thus make ineligible certain offenders.

The official guidelines provide that "every defendant who has been accused of any[192] crime shall be eligible for admission into a PTI program," and Guideline 2 states:

> "Eligibility for PTI is broad enough to include all defendants who demonstrate sufficient effort to effect necessary behavioral change and show that future criminal behavior will not occur. Any defendant accused of crime shall be eligible for admission into a PTI program. When the application indicates factors which would ordinarily lead to exclusion under the guidelines established hereinafter, the applicant nevertheless shall have the opportunity to present to the program director, and through him to the prosecutor, any facts or materials demonstrating his amenability to the rehabilitative process, showing compelling reasons justifying his admission, and establishing that a decision against enrollment would be arbitrary and unreasonable.

Guideline 3 sets out certain factors which must

be considered along with other relevant circumstances. It declares that pretrial intervention is not ordinarily appropriate for juveniles, should not be afforded to those residing at such a distance as to preclude effective service delivery, and is limited to persons charged with criminal or penal offenses in New Jersey Courts.[193] It specifies that defendants who are charged with offenses likely to result in suspended sentences without probation or fine should not be eligible and specifically prohibits the enrollment of those charged with ordinance, health code and other similar violations. The program is not limited to first offenders, but if a defendants record includes one or more convictions of a serious nature, he should be excluded. Even if a defendant at the time of application is on parole or probation or even if he is a former graduate of a PTI program, it is possible for him to be enrolled, although special considerations are appropriate.

The guideline reiterates that any defendant is eligible, but the nature of the crime is a factor to be considered. "If the crime was (1) part of organized criminal activity; or (2) part of a continuing criminal business or enterprise; or (3) deliberatly committed with violence or threat of violence against another person; or (4) a breach of the public trust where admission to a PTI program would deprecate the seriousness of

... (the) crime" the application should be denied although the defendant may present facts or materials warranting his admission.[194]

The New Jersey Supreme Court has declared that it is the offender and not the offense that must be considered.[195]

Despite this appearance of uniformity, as of October 1, 1977, of the 22 programs approved by the New Jersey Supreme Court (7 of which had been approved since the issuance of the guidelines) only one, the Morris County Program was open to all offenses. Four programs admitted indictable and non-indictable offenses, but not drug offenders;[196] thirteen programs admitted indictable offenses only;[197] two programs admitted indictables and drug offenders but not non-indictables;[198] one program admitted CDS indictable only;[199] one program admitted CDS non-indictable only;[200] and one program was solely for alcohol dependant non-indictables.[201]

It is obvious then that the programs do restrict based on offense, and that by approving such programs the New Jersey Supreme Court is failing to follow its own guidelines.[202]

The equal protection guarantees of the federal constitution do not require identical treatment for all offenders.[203] If the distinction among classes similarly situated is not an interference with a non fundamental

right and does not result in suspect classification, there need only be shown a rational state interest.[204]

Economic and/or administrative unfeasibility would, in all probability, be a reasonable basis for restricting the program.[205] If a county after having considered the nature of its problems and the availability of resources to meet these problems determined that in order to expend these resources in the most effective manner it must limit its efforts to certain areas, it would not run afoul of equal protection guarantees.

The PTI program, as designed, does not seem to violate existing equal protection guarantees, and likewise, if it were redesigned to allow for variations among counties it would be constitutional. The present procedure of declaring a uniform policy applicable throughout the state and then approving programs which discriminate against offenders similarly situated violates equal protection guarantees.

At least in theory under the present rule, counties are given discretion as to whether or not to establish programs, but under the guidelines the counties with approved programs must apply the enumerated standards. Although the term guideline would seem to indicate merely a suggested procedure, the language of the guidelines relating to eligibility is couched in mandatory terms. (Every defendant who has been accused of <u>any</u>

crime shall be eligible for admission to a PTI program). The court decisions certainly leave little doubt that the guidelines must be adhered to.

One commentator has noted:

> "... While absolute territorial uniformity is not a constitutional requisite under the Fifth and Fourteenth amendments,[3] there must be some reasonable basis for the lack of uniformity which results in unequal treatment of persons similarly situated in different parts of the territory or jurisdiction.[4] The fact that pretrial intervention may be experimental is not sufficient reason for the different treatment, for the jurisdiction, having once created the program, must apply it to all persons within the class who are similarly situated, absent an economic or administrative justification for unequal applicibility.[5]

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3. Salsburg v Maryland, 346 U.S. 545 (1954)

4. Shapiro v Thompson, 394 U.S. 618 (1969). "We recognize that a State ... may legitimately attempt to limit its expenditures, whether for public assistance, public education or any other program. But a State may not accomplish such a purpose by invidious distinction between classes of its citizens." 394 U.S. at 624

5. See, Griffin v. Illinois, 351 U.S. 12, reh. den. 351 U.S. 958 (1956) where a full direct appellate review could only be had by furnishing the Appellate Court a bill of exceptions, which often required a transcript which had to be purchased and which therefore denied indigents access to the Appellate Court. In holding this provision unconstitutional, the Court opined that while a state is not required by the Constitution to provide a right to appeal, having once done so as a matter of right and not discretion, it then must do so in a way that does not discriminate against some convicted defendants. While a pretrial intervention program which has limited applicability in a particular geographical unit does not create a discriminatory classification based upon wealth as in Griffin, for which a compelling state interest in maintaining the classification must be shown, a discriminatory classification nevertheless is created by the

limited applicability of the program. The principle announced in Griffin that once a jurisdiction has given its citizens a right, it must be allowed to be exercised in a non-discriminatory manner would seemingly compel the jurisdiction to demonstrate that there is a reasonable basis for the discriminating classifications caused by limited applicability. [206]

The official guidelines should be changed to clearly state that eligibility is a matter for each county to decide based on its available economic and administrative considerations.

2. Speedy Trial

Under the provisions of the Sixth Amendment, an individual has the right to a speedy trial. The Fourteenth Amendment makes this safeguard applicable to the states. In New Jersey the state constitution likewise guarantees this right. [207]

Although under the federal law the defendant need not demand trial in order to effectuate his right, his failure to do so is one of the factors that will be considered by the court in determining if the accused's rights have been violated. [208]

Thus, under the federal law there need not be an affirmative showing that the accused has waived his right to a speedy trial, and his mere participation in a PTI program without demanding trial would very likely be regarded as a waiver. In New Jersey the rule is similar, for although in State v Davis [209] the court held that the government must show affirmative evedence of a waiver

and that the mere acquiesence of the defendant was insufficient, later cases have held that the defendant must object in some fashion or his failure to object will be weighed heavily against him should he make a motion to dismiss for lack of speedy trial.[210]

In setting forth the procedures to be utilized by the lower courts in administering the PTI programs, R 3:28 provides in purtinent part that " where a defendant ... has been accepted by the program, the designated judge may ... with the consent of the ... defendant, postpone all further proceedings against said defendant ... for a period not to exceed three months". If further postponement is deemed necessary, it likewise may only be granted with the consent of the defendant. The standard application form issued by the Administrative Office of the Courts to the counties for their use includes a paragraph wherein the defendant voluntarily consents to the government's motion for a continuance and waives his right to a speedy trial.

It is therefore obvious that in order to participate in a Pretrial Intervention Program in New Jersey, the defendant must waive his or her right to a speedy trial.[211]

Is such a required waiver constitutionaly permissible

and if it is, what procedural protections are necessary and or appropriate?

Although there does not seem to be any case law directly on point, it would seem that imposing a requirement of a waiver of the constitutional right to a speedy trial is permissible. Pretrial Intervention is a form of formalized plea bargaining, and the Supreme Court has recognized that a plea of guilty which was allegedly made solely for the reason that the defendant desired to avoid a possible death penalty was not compelled in violation of the Fifth Amendment.[212] This decision was subsequantly affirmed in another case[213] where a plea a guilty to second degree murder was determined not to be improperly compelled despite the accused protestations of innocence and wherein the court noted the appropriate test to be:

> "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.
>
> ...
>
> That he would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of free and rational choice, especially where the defendant was represented by competant counsel whose advice was that the plea would be to the defendant's advantage.[214]

If an individual may plead guilty to an offense in order to avoid prosecution on a more serious offense, a fortiori, he can agree to a temporary postponement of prosecution in order to achieve a greater benefit. (i.e. total avoidance of criminal liability)

In order to make such a waiver truly voluntary it must be intentional and informed.[215] An individual is permitted to waive the right to remain silent,[216] the right to counsel[217] and the right to be free from unreasonable searches and seizures[218] without appearing before a judge in a hearing. These waivers potentially may have a far greater adverse effect on a defendant than the speedy-trial waiver necessary to enter a pretrial intervention program. Consequently there would not seem to be any justification for requiring a defendant to appear before an impartial official in order to effectuate a valid waiver.[219] If a defendant is advised in understandable terms what the advantages and consequences of his waiver are, and is afforded the opportunity to consult with counsel and to discover the evidence against him,[220] his resulting waiver (assuming him to be competent) would undoubtedly be deemed intentional, intelligent and voluntary.

From a practical viewpoint, the necessity of a hearing to determine voluntariness of a waiver would lessen some of the supposed advantages of PTI, those being expeditious disposition and conservation of criminal justice resources.

3. Right to Counsel

There has been considerable debate as to whether or not an individual has a right to the assistance of counsel in connection with his participation in a

pretrial intervention program, and at what time this right, if it exists, attaches.[221]

Guideline 6 provides:

> "Application for PTI should be made as soon as possible after commencement of proceedings, but, in an indictable offense, not later than 25 days after the original plea to the indictment."

In the comment accompanying this rule, it is explained that the purpose for it is that "cutting off applications at 25 days after the holding of the arraignment permits defendants sufficient time to explore with counsel the risk of conviction ... so as to be able to make the most intelligent and voluntary choice to seek PTI enrollment. In making such a decision, defendants have an opportunity under New Jersey's liberal discovery rules to make an effective evaluation of risk, and an opportunity to challenge law enforcement conduct through motions to supress."[222]

In practice, defendants are advised, "You may and <u>should</u> talk with your lawyer before signing this application and agreement. If you do not have a lawyer, ask the Court Liaison to help you arrange for one."[223] An individual thus has the right to consult with counsel prior to enrollment, is encouraged to consult with counsel, and if he desires counsel but cannot afford it, he is provided with counsel. In practice, the programs investigated have established a working relationship with the local offices of the Public Defender that ensures

that those desiring counsel receive it.

Once an individual is enrolled and his or her performance or progress in unsatisfactory, they may be terminated. In the letter advising the participant of a pending consideration to recommend to the court termination,[224] the participant is advised that he may bring counsel to a meeting with the program staff to contest this decision, and in the termination notice sent by the court[225] the participant is likewise advised of his right to counsel should he desire to contest the termination.

It is thus apparent that in theory and in practice in New Jersey, the prospective participant and the participant are afforded counsel at every critical stage of the program.

4. Due Process

A great deal of effort has been expended in New Jersey to insure that due process requirements are met. Guideline 8 is the principal safeguard, and it provides:

> "The decisions and reasons therefor made by the designated judges (or Assignment Judges), prosecutors and program directors in granting or denying defendants' applications for PTI enrollment, in recommending and ordering termination from the program or dismissal of charges, in all cases must be reduced to writing and disclosed to the defendant.
> A defendant may be accepted into a PTI program by the designated judge (or the Assignment Judge) on recommandation of the program director, and with the consent of the prosecuting attorney and the defendant. Applications which are recommended for enrollment by the program director and consented to by the prosecutor must be presented to the designated judge (or Assignment Judge) authorized to enter orders.

> If a defendant desires to challenge the decision of a program director not to recommend enrollment or of a prosecutor refusing to consent to enrollment into a PTI program, a motion must be filed before the designated judge (or the Assignment Judge) authorized to enter orders under R 3:28. The challenge is to be based on alleged arbitrary or capricious action, and the defendant has the burden of showing that the program director or prosecutor abused his discretion in processing the application. No direct appeal can be filed to the Appellate Division challenging the actions of the program director or the prosecutor. However, the decision of the program director or prosecutor may be challenged at a hearing on defendant's motion before the designated judge (or Assignment Judge) and, thereafter, defendant or prosecutor can seek leave to appeal from the court's decision denying or permitting enrollment.
>
> A defendant shall also be entitled to a hearing challenging a program director or prosecutor's recommandation (following an initial or subsequent adjournment under rule 3:28) that the prosecution of defendant proceed in the normal course. The decision of the court shall be appealable by the defendant or the prosecutor as in the case of any interlocutory order.

"When an application indicates factors which would ordinarily lead to exclusion ... the applicant nevertheless shall have the opportunity to present to the program director, and through him, to the prosecutor, any facts or materials ... showing compelling reasons ... establishing that a decision against enrollment would be arbitrary and unreasonable."[226] If the nature of the crime is such that it would generally cause the application to be rejected, the defendant may once again attempt to avoid such rejection, but again the standard of "arbitrary and unreasonable"applies.[227]

In order to evaluate the operative effects of the

due process safeguards, it is then necessary to look at how the courts have interpreted the words "arbitrary and unreasonable" and to consider how the defendant might go about proving that his exclusion was the result of an arbitrary and unreasonable decision.

There are then two points within the program at which due process considerations become applicable. The initial decision to enroll or not to enroll, and a subsequent decision to terminate the participant and return him to normal processing. In the former it would appear that the individual is seeking a privilege which he has no vested right to receive[228] while in the latter he is facing the loss of a conferred benefit.[229]

Prior to the Supreme Court's decision in Leonardis I, there was some question as to what type of proceeding was necessary in order to review a prosecutor's determination to deny diversion, but in Leonardis I the court said:

> "Although a trial-type proceeding is not necessary, defendant shall be accorded an informal hearing before a designated judge for a county at every stage of a defendants association with a PTI project at which his admission, rejection or continuation in the program is put in question. A disposition is appealable by leave of court as any interlocutory order."[230]

As previously noted, the Official Guidelines subsequently enacted further addressed this issue and specified the standard that the defendant had to overcome in order to have the decision reversed.[231]

In State v White[232] the court was faced with the

question of what rights the defendant was entitled to at the proscribed informal hearing appealing the denial of an application. The court held that the defendant was not entitled to a hearing in which witnesses could be called to explain the circumstances of the crime and/or testimony would be offered by an expert concerning his opinion as to the defendant's suitability for pretrial intervention. The court stated that its review would be limited to a review of the record before the program director and the prosecutor to determine if their action was arbitrary and capricious.[233]

Leonardis II was decided on May 31, 1977 and as previously noted, the Court clarified its intention to impose a heavy burden on the defendant who attempted to overturn a prosecutors decision not to divert. It stated that a defendant must clearly and convincingly establish that the prosecutor's refusal to sanction admission to the program was based on a papent and gross abuse of discretion.[234] In discussing the nature of the hearing to be afforded the defandant the Court cited with approval the holding in White and reiterated "that review need not amount to a trial type proceeding, but should be of an abbreviated and informal nature" and that "(t)his hearing should not constitute a trial de novo on the applicant's admissibility, but should be confined to a review of the prosecutors actions."[235]

Although the court restated its prior position

that "a disposition by the trial court is appealable by leave of court" it also stated:

> We intend to continue our supervisory role over the operation of this program and the legal determinations of reviewing courts and local officials. We do not expect, however, that these proceedings will occupy a significant portion of trial or appellate court time. By their very nature, the guidelines place primary responsibility for even handed administration of the programs in the hands of the prosecutors and program directors. Judicial review should be available to check only the most egregious examples of injustice and unfairness."[236]

There could be no doubt after White and Leonardis II that a defendant who desired to overcome a prosecutors decision not to divert was faced with an extremely heavy burden and that his methods of overcoming the burden were limited.

One method of showing that a prosecutor's or program director's decision was arbitrary and capricious would be to show that it was a totally unexplained variation from the norm; however, in order to do this one must be able to ascertain "the norm." Just such a course was attempted in State v Forbes.[237]

Defendant Forbes was originally indicted in August 1976 for conspiracy to commit larceny, larceny and embezzlement. He applied for an existing PTI program and was rejected. In anticipation of making a motion for reconsideration under Guideline 8, the defense counsel asked the program director for permission to review all the PTI files. This request was denied and the defense counsel then served a subpoena duces tecum on the

program director requiring him to testify as to his reasons for rejection and requiring production of all records and files concerning applications, processing of applications, and acceptances and rejections from the inception of the local program until that time. The program director refused to honor the subpoena and the court was called upon to decide the issue.

The court rejected the request to call the director as a witness, claiming that to allow this would be to allow a trial de novo, and it did not allow the defense counsel access to the records, claiming that they were confidential and irrelevant.

Although there is admittedly a degree of subjectivity involved in the decision to enroll, there are many objective standards which must ordinarily be met. At the present time, some programs have completed extensive statistics and the Administrative Office of the Courts has initiated action that will provide statistical information showing the factors present in rejected applicants, successful participants and terminated individuals. To allow a defendant to use statistics from a particular program to show that during the last year all applicants having the same statistical profile as himself had been enrolled and that none had been rejected would not constitute an infringement on the confidentiality requirments of Guideline 5, and it would give the defendant a reasonable chance to at least raise an inference that his exclusion was based

on objectionable criteria not included in the written justification.

If a defendant cannot interview or examine a program director, and cannot present reliable evidence to show "normal" processing, how is he to show that the program director's or prosecutors behavior is arbitrary or capricious?[238] Action is not arbitrary or capricious in and of itself, but only when considered in the light of a determinable standard. The Courts decision in Forbes effectively precludes the defendant from showing that his rejection was an arbitrary and capricious act, and it thus reduces to a meaningless formality the supposed due process protection afforded by the review procedures.

In determining whether or not an individual has been afforded due process in a procedure that has rejected his request for the granting of a privilege or benefit to which he has no vested right, the courts have a long-standing tradition of finding that little if any due process must be afforded.[239] When this is considered together with the many cases that make the prosecutors decision to prosecute virtually unreviewable, one must conclude that the New Jersey procedures are constitutional.[240]

There still remains the question of what procedures are required to satisfy due process guarantees when an individual is terminated. Here, as previously noted, we are dealing with an entirely different situation than

the decision to divert, because the individual has been granted a benefit and the government is attempting to take that benefit away. Cases dealing with probation,[241] welfare benefits,[242] parole violations[243] and public housing[244] would seem to be applicable here, and without exception they would all seem to indicate that a defendant who is to be terminated must, at a minimum, be advised of the reason for the proposal to terminate and must be given the opportunity to be heard and to present material before an impartial fact-finder to contest the decision to terminate the benefit.

The New Jersey procedures would seem to satisfy due process requirements in this area. First and very possibly foremost, it should be kept in mind that neither the program director nor the prosecutor has the power to terminate the participant. The power to terminate is exclusively a power reserved to the judiciary, and although the court is required to consider the recommendations of the prosecutor and the program director, it will decide the matter in the first instance and, it can be assumed, will exercise its own best judgement.

In Leonardis II the court specifically declined to consider what procedures are necessary when a defendants participation in pretrial intervention is terminated,[245] but the rule itself and the guidelines provide some insight as to how the court will decide the issue.

Rule R 3:28 states that at the end of the initial period of participation the court may dismiss the complaint[246] or extend the period of participation based on the recommendation of the program director and with the consent of the prosecutor and the defendant.[247] No written recommendation is required for these actions, but should the court desire to terminate the participant[248] it may only do so on"the written recommendation of the program director or the prosecutor."[249] Before such a recommendation is submitted to the judge, a copy of it must be given to the defendant and his or her attorney and they must be advised that the judge will afford them the opportunity at a hearing to be heard on the matter.[250]

Guideline 8 further requires that the reasons for the recommendations must be reduced to writing and disclosed to the defendant, but it does not shed any additional light on the nature of the hearing that must be afforded the participant. The guidelines dealing with the appeal of the program directors or prosecutors decision not to enroll a defendant all provide opportunities for the defendant to present materials to these decision makers to show that a determination to refuse participation would be improper, and it was largely based on these provisions that the courts have held that the defendant was not entitled to introduce new material before the court.

There are no such provisions in the guidelines

concerning the recommendation to terminate, and it must therefore be assumed that the defendant could submit his materials for the first time to the Judge at the termination hearing.

In practice the defendant is afforded the opportunity to contest the recommendation for termination prior to the time it is made. When consideration is being given to recommending termination, a form letter is sent to the participant telling him that "Pretrial is considering terminating your participation and returning your case to the Court for trial..."[251] The letter details the reasons for the action and advises:

> You may still contest this decision by appearing in our office on _____ for a meeting with your counselor and Pretrial's Program Director. If you intend to appear you must call this office three (3) days before that hearing date. Otherwise, PTI will assume you do not wish to contest this decision."

The letter also advises the participant to show the letter to his attorney and that the attorney may attend the meeting.

After the decision is made to recommend termination the participant is so advised, and is advised that he has the right to contest this recommendation. He is once again advised of the reasons for the recommendation and of his right to counsel at the hearing.[252]

It is thus apparent that under existing procedures the defendant is provided with all the required due process safeguards in association with his termination from the program.

VI. SURVEY OF SELECTED PROGRAMS

In order to evaluate the true effectiveness of the Pretrial Intervention Programs in New Jersey, it is necessary to look at how the individual county programs are operating. At the outset it was obvious that time would not permit this author to visit each county and interview those concerned with the programs. After consulting with the Head of Pretrial Services Division of the Administrative Office of the Court,[253] it was decided that a review of the programs in Hudson, Burlington, Camden and Mercer counties would give a sufficiently accurate impression of how different programs throughout the state were functioning.

Hudson county was chosen because of the fact that it is the oldest and the second largest program in the state, and it has attempted evaluations of its effectiveness. It was also considered appropriate to look at the Hudson County program for it includes non-indictable offenses, whereas the majority of the other counties do not include defendants charged with these offenses. The Hudson County program is under the sole supervision of the Court Administrator.

Burlington County was chosen for it is neither predominately rural nor a predominately urban county, and it has a recently created program under the joint

control of the Court Administrator and the Probation Department. While the staff of the Hudson county program consists of 19 individuals, the Burlington county staff included only 5, and the Burlington County program is one of the smallest in the state. The Burlington County PTI program does not take individuals charged with non-indictable offenses but does take those being charged with drug offenses under N.J.S.A.24:21-27.

The Camden County program was selected because it is one of the largest in the state, the county is predominately urban, the program is under the exclusive control of the probation office and it handles all offenders. The program is only two years old, and it could be expected to be in a different stage of development than the Hudson County program.

Finally, the Mercer County Program was selected because of its proximity to the state headquarters, the fact that it is of medium size, and has been operating for two years longer than the Burlington County Program, the fact that it is under the exclusive control of the Court Administrator, and the fact that it took indictable and non-indictable offenders, but not those charged with drug offenses under N.J.S.A. 24:21-27.

Although other counties representing these same characteristics could have been found, these were chosen

because of their proximity and the author's contacts in some of the counties which facilitated the gathering of information.

A. County Programs

1. Burlington County

a. General

Burlington County encompasses 817.64 square miles and in 1976 had an estimated population of 331,745. Its estimated density per square mile in 1976 was 405.7 and of its 39 incorporated units, none were classified as urban, 10 were classified as urban suburban, 8 were classified suburban, 5 were classified suburban rural, 13 were classified rural and the remainder rural center.[254]

b. Initiation of Program[255]

The Burlington County PTI program was initiated in early 1976 based on the suggestion of a probation officer. Working together, the Probation Department, the Criminal Justice Planner, and the Public Defenders Office jointly developed the program, and after it was approved by the local courts and the Board of Freeholders, it was submitted for Supreme Court approval in the fall of 1976. The proposal was approved on December 1, 1976 for an effective operational date of February 1, 1977, but, in fact, the program did not start screening applicants until March 7, 1977. The program was initially funded by a 6 month SLEPA grant[256] of $27,800.00 and contributions of $1500.00 each from the county and

the state.

c. Staff

The staff consists of a Director, a Program Coordinator, three Counselors and one clerk. The Director does not actively participate in the functioning of the program and, in fact, all decision making and coordination is performed by the Program Coordinator.

The Program Coordinator is an ex-police officer with 9 years experience as a probation officer. He is a college graduate with a major in psychology. The counselors are all former probation officers with less than two years experience. One counselor is doing graduate work in psychology, another is a retired military enlisted man with extensive in-service law enforcement experience and the other is a recent college graduate.

The staff salaries are approximately; Program Coordinator, $17000.00 per year; Counselors, $9500.00 per year; and clerk, $7000.00 per year. There are no investigators or other people assigned to work with the program and, except as noted below, the staff performs all interviews, investigations, counseling and associated functions.

All of these positions are in addition to previously existing positions in the probation department, and no agency experienced a cut in personnel or funds as the result of the establishment of the Pretrial Intervention

Program.

One counselor left the program 6 months after its inception in order to take a higher paying position with the prosecutor's staff.

d. Budget

The current annual budget for the program is approximately $63,000.00 of which 90% is funded by a SLEPA grant and the remainder is evenly split between the county and the state. This funding is expected to continue for two more years.

With the exception of $1500.00 allotted for phone service, the entire budget is for salaries.

The space occupied by the program offices, the furniture and operational administrative needs of the staff and the other expenses encountered by the program are absorbed by the Probation Department.

The majority of the cases handled by the program are referred to other community agencies for evaluation, treatment and help. The services provided by these other agencies are not billed back to PTI and consequently there is no way to estimate their cost.

e. Admission Criteria and Procedures

If an individual is not brought before a judge for a preliminary hearing or otherprocedure, there is no formalized way in which he is advised of the availibility of PTI until he is initially called on to plead.

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Although the Supreme Court has declared in its guidelines that "every defendant who has been accused of any crime shall be eligible," (emphasis in original)[258] the Burlington County Program only enrolls offenders charged with indictable offenses, and no effort is made to advise individuals charged with non-indictable or disorderly persons offenses of the programs availibility. The basis for this is the belief within the county that the term "crime" does not include these lesser offenses.[259]

The program relies to a considerable extent on "informal" referrals which occur because of referrals by counsel, police, friends, or other sources.

Once an individual visits the office, a standard referral form is completed by the clerk and an appointment with a counselor is scheduled 2 to 4 weeks later. At the interview with the counselor the defendant completes the standard interview form plus he answers additional questions on local forms. At this point he enters into an informal period of participation which, on the average, lasts three months.

During the nine months of its existance in 1977 the Burlington County Program had 412 applicants complete the referral form, butthis in no way represents the total number that were interested, for there is an unwritten policy that certain types of offenders need not apply, and the clerk, the public defenders office, and area social services have been encouraged not to refer these

type offenders or offenders with extensive records or other disqualifying attributes.

Of the 412 that applied, during this informal participation period 279 were rejected, but many of these were as a result of their failure to adhere to their participation agreement rather than the unsatisfactory nature of their qualifications. 210 of these rejections were by the Program Coordinator, 10 by the Prosecutor, and 2 were by the judge. 15 of the individuals rejected withdrew their request to participate and 42 had their offenses downgraded or dismissed and were thus no longer eligible for participation. It is interesting to note that neither the prosecutor nor the judge reads the complete file dn the applicant prior to deciding to accept or reject him.[260]

The Burlington County Prosecutor's Office has established a screening unit which reviews each and every indictment handed down in the county, and as a result of this review 52% of the charged offenses are downgraded or dismissed.[261]

In conducting the investigation into the facts provided by the applicant the State Bureau of Investigation and the Federal Bureau of Investigation files are checked. These are by *no means* inclusive, and if an individual has been arrested or summoned without being fingerprinted his record will not appear in these files. Likewise, although some effort is made to check in the

communities in which the applicant has ties, juvenile records, disorderly persons and ordinance violations and out of state offenses could very well go undiscovered.

The family and friends of the defendant are contacted as is his employer unless he convinces the counselor that such contact would be unduly harmful.

All applications are personally reviewed by the Program Coordinator, who then briefs the prosecutor and the judge. The prosecutor is thought to only refuse to consent when the nature of the offense is such as to make such consent inappropriate. The Program Coordinator does not allow the prosecutor access to the complete file because he believes that such would violate the confidential nature of the information. Consequently, it seems appropriate to conclude that his refusal to consent could not be based on a complete review of all available facts. Although the complete file is available to the judge, he does not ordinarily review it, and he bases his decisions on the recommendation of the Program Coordinator and the nature of the offense.

f. Operation of Program

This program is multi-problem oriented, and it directs participants to whatever available community services will help him to resolve the problems that led to his arrest. This can include social or welfare assistance, psychiatric help, drug or alcohol abuse

counseling or just about any other conceivable service.

The staff to participant ratio is 1 to 10 as compared to a staff to probation or ratio of about 1 to 190 in the same county.

The counselor and the participant, after a series of tests, professional evaluations and interviews, decide on what program is necessary to help the participant and once it is agreed upon, a Participation Agreement is signed whereby the participant agrees to satisfy specified requirements. This agreement is forwarded to the Program Coordinator with all the other information, and he then makes his recommandation as to whether or not enrollment is appropriate. The Program Coordinator admitted that although in some cases supervision is not needed in order to rehabilitate, nonetheless some supervision is imposed in order to impress on the participant the fact that he must earn his dismissal.

During the period of enrollment,the counselors are expected to and do maintain constant liason with the applicants employer, his family, and others who would know of his behavior, but a second police check is not run prior to deciding that the individual has successfully completed the program.

g. Termination

If a man does not complete his infornal period of participation he will be "rejected," but if he is accepted into the program and fails to complete

it he is"terminated." Although under the enabling rule and the guidelines these are quite differant, the procedures used in Burlington County to accomplsih both are identical.

If consideration is being given to discontinuing a participant, he is advised in writing of this fact and is given the opportunity to appear before that Program Coordinator in order to contest the decision. If the decision to reject or to recommend termination is then made, the participant is afforded the opportunity to resist this disposition in a hearing before the judge, and it is the judge who will finally decide.

The Program Coordinator stated that counselors informally warn an individual a number of times before they recommend that his participation be discontinued, and it is thus rare for him not to discontinue an individual whom the counselor recommends for such disposition.

As previously noted, there were 222 rejected. 32 of these individuals appealed and none were subsequently enrolled. There were 3 terminations and all of these were based on the individual fleeing the area, and, as would be expected, none of these appeared to contest the decision.

h. Evaluation of Program

There has been no formal or informal study made to determine the cost of the program or its effectiveness.

No affirmative effort is made to follow graduates due to a lack of time and people, and there is no established procedure to insure that PTI is advised of subsequent arrests of those previously associated with the program. In short, there is no means to accurately determine recidivism or to ascertain whether or not the problems addressed by the program were truly solved or merely repressed and subsequently reappeared.

i. Future Plans for the Program

Although the program is assured federal funding for two more years, the amount is established and not likely to be increased. The Program Coordinator feels that at least one additional counselor and one more clerk are needed, but he does not expect to get them.

j. Miscellaneous

Based on his long experience as a probation officer, the Program Coordinator stated that he felt that none of the offenders being diverted into PTI would have been sentenced to confinement and that at least 50% of them would never have gotten into trouble again. He felt that these would have been some of the better individuals assigned to any probation officer, and would have required a minimum of supervision and attention. In evaluating the benefits of PTI, the Program Coordinator surmised that there were a couple that stood out. He conceded that PTI could not be

shown to have saved either money or time in any individual case, and he doubted if the few cases being processed had any significant effect on the courts or the probation department, but he felt that by avoiding the stigma of the conviction and by providing for the early delivery of services to that 50% who might have gotten in trouble again, PTI was providing a needed alternative in the Criminal Justice System.

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2. Mercer County

a. General

Mercer County encompasses 226 square miles and in 1976 had an estimated population of 321, 050. At that time its estimated density pre square mile was 1,345.6. Of its 13 incorporated units, one was classified as urban center, 6 as suburban, 2 as suburbam rural, 2 as rural center, and 2 as rural. Roughly 33% of the population is contained in the urban center of Trenton, and the population density there is 14,243.3 per square mile.[263]

b. Initiation of Program

The program was initiated by its present coordinator while he was working in the Office of the Court Administrator of Mercer County. At the time he was involved in Pretrial Services in general and the administration of the Court's R.O.R.[264] program in particular. According to the Program Coordinator, there was considerable resistance to the PTI concept from the prosecutor's office, the police, and the private bar; however, after the program was approved and information on it became more widely understood, this resistance lessened. The program received approval on March 3, 1975 and screened its first clients on the same day. Initially 90% of the cost was funded by S.L.E.P.A. grant and the remaining funding was provided in equal part by the county and the state.

c. Staff

At the present time the staff consists of a Program Director, a Program Coordinator, an Assistant Program Coordinator, six Counselors (i.e. court liasons), 1 clerk and 2 part time students. One of the counselors is a former teacher and three are directly out of college. Information on the others was not available. The Assistant Coordinator is a former probation officer and the Coordinator is an attorney with 12 years of experience as a probation attorney. It was not possible to ascertain the salaries of the staff members since the Coordinator refused to divulge this information and refused to allow me to talk to his staff. All of the members of the PTI staff are additional county employees and no agency of the county or state government experienced a reduction in personnal or in funding as a result of the program's creation. There have been two individuals who have left the staff for better jobs.

Two of the counselors are CETA employees and their salaries are not part of the program's budget.

d. Budget

At the end of the first quarter of 1978, the program will no longer be primarily funded by a S.L.E.P.A. grant, and the funding will become entirely a county obligation. In the first quarter,

the budget is $25,000.00 while for the remaining three quarters the program coordinator is requesting approximately $172,000.00

The program does purchase some services such as professional evaluations and professional counseling from other agencies, but the Coordinator refused to specify how much of his budget was for salaries, how much for administration, how much for purchase of services and how much for other expenses. It was ascertained that the program does not pay for its spaces and utilities, and that it does receive other in kind support at no cost.

There has not been any cost effectiveness study although they hope to have one in 1978.

e. Admission Procedure and Criteria

Defendants are selected from those appearing for preliminary arraignment before the local municipal or county courts. Additional defendants are selected from cases informally referred by the prosecutors, public defenders, private attorneys, police, probation and parole officers and from other sources. The program has prepared a detailed descriptive announcement of the program which it has distributed throughout the area. .... The increased awareness of the programs existance and criteria caused by this announcement and by the formal requirements

of notice imposed by Court Rule are the basis for the majority of referrals to the program.

At the applicants first contact with the PTI program, an interview is conducted by a counselor during which the program, the nature of participation and the defendants obligations are explained. The necessity of having counsel is explained, and if the defendant is not represented, he is referred to the local office of the Public Defender or advised to seek other counsel.

During the initial interview, the Initial Interview Form is completed, amd if the defendant wishes to continue to be evaluated for participation, he/she is advised to sign a Participation Agreement and an Order of Postponement.

It is at this initial session that the counselor and the defendant agree tentatively on a regime of treatment.

Defendants found acceptable at the initial interview are assigned to counselors and participate fully in the PTI program for a period that is expected to last up to 4 weeks, to review motivation and to develop a plan of counseling.

The Mercer County Program accepts applications from all offenders and in excess of 50% of its applicants are charged with non-indictable or disorderly persons offenses.

According to the Program Coordinator, there is no informal discouragement and all applicants may apply. By the end of January 1978, 2930 individuals had been interviewed, 711 were awaiting a decision, 1189 had been rejected,[266] 31 had been terminated,[267] 771 had successfully completed the program[268] and the remaining 228 were still active. Each counselor then, assuming equal workloads, would have 38 formally enrolled participants and 118 informally enrolled applicants.[269]

It should be noted that although the officially published and distributed project announcement clearly states that there is a period of informal participation, the program coordinator refused to admit that such a period of informal participation existed. In light of the high client/staff ratio, it would appear that whatever supervision and counseling does exist during this period must, of necessity, be extremely limited.

In Mercer County, if a jailed individual is willing to participate in PTI his release from jail on his own recognizance will be facilitated.

The information that the applicant puts on the initial interview form is the primary source of information other than the police reports of the incident that are available to the PTI staff. Although a check is run with the FBI and the SBI

only those offenses for which the defendant has previously been printed will appear. No effort is made to discover a juvenile record nor are area police and municipal courts checked. The employer and the family are not consulted.

f. Operation of Program

The program attempts to provide a multitude of services and does this primarily by referring the cases to other in-county agencies. There are no standards as to how often counselors must meet with participants, but initially they usually meet twice a week and subsequently less frequently. No information was given as to the average legnth of the sessions or as to their nature.

In deciding whether or not an individual has successfully completed the program, no checks are made with the employer or with the individuals family, no new check is made with area police or courts, and other than the common standard of "Did the applicant cooperate?" there are no specific factors that must be satisfied.

g. Termination

In Mercer County it is felt that terminations will most commonly be predicted upon rearrest and "failure to cooperate." "Failure to cooperate" varies from a refusal to continue in a rehabilitative program to repeated failures to maintain required

counseling or supervisory contacts with the staff.

In this program there is a distinct difference between the procedures utilized to"reject" an individual and those used to "terminate" one.

The rejection occurs prior to enrollment during the period of supposed informal participation. If a rejection is anticipated the defendant is so advised, and he is afforded the opportunity to submit written information to the Program Coordinator or the prosecutor contesting the decision. He is not afforded a personal hearing. He may, of course, appeal the decision to the Court where it will be reviewed for a gross abuse of discretion.

A "termination" occurs after enrollment. The individual is advised in writing that termination is being considered and of his right to appear before the Program Coordinator to contest the decision. At hearing he may be represented by counsel, the evidence against him will be divulged, he will be afforded the opportunity to testify and present evidence, and, if appropriate, to cross examine adverse witnesses. If the Program Coordinator decides against the participant, he must give the defendant a written report of the hearing, the decision reached and the grounds on which that decision is based.

The participant is advised of his right to a

hearing before the designated judge and the rights at this hearing are similar to those in the prior hearing.

Before an individual is formally warned of a pending rejection or termination for failure to cooperate, he is informally cautioned a number of times by his counselor. If he continues to be uncooperative, formal action is initiated.

At least 50% of those formally notified of pending rejection or termination resist the decision and appeal.

If a participant is rejected or terminated, he is returned to normal processing, and no special effort is made to expedite his case.

h. Evaluation of Program

There has not been any study conducted to evaluate the effectiveness of the program other than the statistical records submitted by the coordinator to the courts. The program coordinator felt that there was no way to keep track of rates of recividism, and no attempt is being made to do so. There are no records kept that would give a cost per participant. The program has never been thoroughly evaluated nor does it have the capability to conduct such an evaluation since pertinent records are not being kept.

i. Future Plans for the Program

It is hoped that a full time employment

counselor can be added and that the staff can be increased to allow for closer supervision and better follow up on participants

j. Other Comments

It was felt that most of the PTI participants would have been put on probation although some from the municipal level would have been sent to jail. The coordinator would like to see more effort at the municipal level in order to divert these offenders before they move up to more serious crimes.

The Program Coordinator fluctuated in his responses between guarded and defensive, and he refused to allow any of his people to talk to me. His remarks could very well indicate how his program should be operating rather than how it does.

3. Camden County

a. General

Camden County is located immediatly across the river from center city Philadelphia. It is 222.01 square miles in area and in 1976 had an estimated population of 484,305. The average population density per square mile within the county was 2,181.5; however, approximately 20% of the population was in the 8.68 square miles of Camden City, thus giving this area a population density of 11,582.4 per square mile. Of its 37 incorporated units, one was classified

urban center; 13 were classified urben suburban; 6 were classified suburban rural; and 3 were classified rural.[270]

b. Initiation of Program[271]

Initially Camden County had two separate programs. One was a federally funded T.A.S.C. program and the other was a county funded PTI program. When the federal grant expired, the two programs were merged and at the present time there is only one program in the county. Initially both programs were approved by the Supreme Court on December 13, 1974 and they both commenced operations on January 6, 1975.

An individual within the probation department originally suggested the programs and members of the probation department were primarily responsible for the development and submission of the program proposal. There was no significant resistance from the prosecutors office or any other agency, and the plan was approved by the Supreme Court without modification.

c. Staff

At the present time the PTI staff is an integral part of the probation department and the number on the staff can fluctuate depending on the needs of other sections of the department. Generally there are approximately 20 on the PTI staff. They include the Director, the Coordinator, the Deputy

Coordinator, a Counselor supervisor, 7 Counselors, 4 Intake Officers, and 4 Clerks.

The Intake Officers initially interview the applicants and it is they who devise with the applicant an appropriate participation agreement.

All of the supervisory personnal are former probation officers and all of the Counselors and Intake Officers have college degrees. Two of the Intake Officers have graduate degrees in the behavior field. The salary range for the Counselors and Intake Officers is $6,000.00 to $14,000.00 per year.

When the program was set up the Probation Department reduced the number of Probation Officers by 2, but no other agency experienced a reduction in personnel, and no county agency had their funding reduced as a consequence of the development of this program within the county.

There has been a considerable staff turnover and only 2 or 3 of the counselors and Intake Officers presently with the program were there at its inception.

d. Budget

Figures on the budget were not available, but it was noted that the budgets of other sections of the probation department and of other county agencies had not been reduced because of the PTI program. The budget for the PTI program is co-mingled

with the overall probation budget, and the spaces, utilities and furnishings are provided for by the probation department.

The PTI program acts primarily as a referral agency, and the agencies to which PTI refers its participants for evaluation and treatment do not bill back the PTI program for these services.

Although there was a cost effectiveness study run on the T.A.S.C. program by an independant agency, none has been run on the PTI program and none is planned.

e. Admission Criteria and Procedures

The program has distributed information about the program to area attorneys, police and prosecutors, and it has distributed referral forms to the municipal courts and others who might have occassion to refer individuals. These referral forms are completed by the defendant, his attorney or the referring individual, but they are not completed by the PTI-staff.

When an individual appears at the office seeking admission, it is first determined if he is eligible. If he is not, he is not allowed to submit an application and he is simply told that he may not apply.

If the individual is eligible, he is given the standard state initial interview form with a local 6 page supplement and told to take it home and fill

it out. Help is provided if necessary, but it is primarily the applicant's responsibility to complete this form.

The program does not keep cumulative statistics, consequently it was not possible to determine the total referrals since the programs inception, but during 1977 approximately 1200 referrals were accepted and all of these were subsequently given an initial interview.

At the initial interview, the prospective participant is given a detailed list of what is expected of him and he is clearly advised that failure to satisfy these requirements may or will result in rejection or termination.

After a defendant applies, there is a period of informal participation that varies in legnth; however, it generally lasts two months. During this period the individual is investigated and evaluated, and his motivation is reviewed. Every attempt is made to involve the applicant in treatment at this stage. At least 20% of the applicants are found wanting in motivation during this period and they are terminated.

The fact that a defendant has applied for the program will have little if any effect on his chance for bail or R.O.R.

In reviewing the information provided by the applicant on the initial interview form, only a

limited check is made to discover a prior criminal record. The S.B.I. records are checked to determine prior arrests and convictions; however, this file only contains a record of offenses for which the applicant was fingerprinted. The defendant's home community is checked to dicover any offenses committed therein, and this check includes a review of juvenile records for those applicants less than 21. If an applicant lists an out of state address, that state is checked. An effort is made to determine if there has been prior PTI participation in Camden County. Employers and family are contacted if the applicant consents.

f. Operation of Program

Since the separate programs have been combined, the present Camden County PTI program is multi-problem oriented and it refers individuals to whatever services are needed within the county.

Each Counselor has 50 enrolled participants under their supervision and each Intake Officer has approximately 90 individuals who are participating while being considered for enrollment. The Intake Officers are also responsible for processing all new applicants and although they are primarily responsible for devising each participants program of supervision and treatment, others such as the prosecutor, the judge, and the Counselor have some input into the planning.

During the initial period of informal participation

each applicant is evaluated and begins his program of rehabilitation. Supervision during this period varies according to the particular needs of each client, but the individual is expected to keep appointments and actively participate in his assigned program of treatment.

After an individual is accepted, he is expected to see his counselor at least once every two weeks unless he is undergoing professional treatment or counseling in which case the supervision by the staff is indirect. The Counselor has a continuing responsibility to maintain contact with the participant and the agency to which he was referred, and the counselor is expected to visit the participant on unannounced occassions at home and at work.

There is no set criteria for determining successful participation. If a participant is making a real effort to improve his situation by faithfully adhering to his prescribed program, his charges will be dismissed.

In order to ensure uniformity in staff performance, there is a staff meeting each week, and all acceptances or rejections are handled by the Coordinator or his deputy. The Counselor Supervisor works with the counselors and intake officers on a regular basis, and this helps to promote uniformity.

g. Termination

The Deputy Coordinator estimated that only about 1/3 of those originally referred to the program are eventually enrolled. He estimated that as few as 2% of those actually enrolled are terminated. The most common reason for termination has been re-arrest and failure to cooperate.

The precedures for rejection in Camden County are different than those previously discussed. When an indivisual initially applies for enrollment, he is given a standard set of terms and conditions. These tell him in no uncertain terms what is expected of him and what the consequences will be for his failure to adhere to these terms and conditions. If an individual fails to meet these requirements he is sent a letter of rejection without being given a hearing.

For those terminated after enrollment, the same procedures as previously described for Burlington County are utilized. The participant is notified in writing and given a hearing before the Coordinator or his deputy.

Before official action is taken to reject or terminate an individual for failure to cooperate, he is usually cautioned on numerous occassions by his counselor.

Approximately 20% of those notified of rejection

subsequently resist this disposition, but between 30% and 50% of those terminated have contested that action. If an individual is rejected or terminated no special action is taken to expedite his case. The case is merely returned to normal processing.

h. Evaluation of Program

At the present time the Coordinator is doing an evaluation of the program, but no information as to the scope or results of this evaluation were available. In light of the fact that cumulative statistics are not kept, the budget is co-mingled with the general probation budget, and there are no valid statistics on recividism being kept, it is doubtful that this evaluation would be of a nature to effect this author's evaluation of the program.

i. Future Plans for Program

The Deputy Coordinator said that at the present time there are no plans to significantly change the size or nature of the program; however, he awaits with apprehension the outcome of those cases presently on appeal in New Jersey which seek to force programs to accept non-indictable offenders and disorderly persons offenders. It is felt that if these type offenses must be included, the size and cost of the program will be greatly increased.

4. Hudson County

a. General

Hudson County encompasses only 46.42 square miles, but in 1976 it had an estimated population of 606,190, thus giving it an estimated population density per square mile of 13, 058.8. Hudson County has twelve incorporated subunits, four of which are classified as urban center and eight of which are classified urban suburban. Three of its subunits had a population density exceeding 35,000 persons per square mile.[266]

b. Initiation of Program[267]

The Hudson County PTI program was the first county wide program in New Jersey and was a direct outgrowth of smaller programs in Newark and Jersey City. The Hudson County prosecutor and Gordon Zaloom, who was then the director of the Newark program, worked together during 1971 to initiate the program. Supreme Court approval was obtained in November 1971, but it was a few months before the program became operational, for it was necessary to obtain funding and hire and train personnel. Although there was initially some resistance from the public and the police, the resistance was not organized and it did not pose a significant problem. The proposal that was submitted was accepted without change, and the Hudson County program has in the past and continues to serve as a model for other programs throughout the state.

The Hudson County program was initially funded primarily through a SLEPA grant with some in-kind support from the county and the state.

c. Staff

At the present time there are 19 full-time people on the payroll. There are also two SETA employees, and there are two student interns who are serving voluntarily while working for their masters degrees in social work at Columbia. The Probation Department is supposed to assign three probation officers to the staff, but at the present time only one is assigned. The program employs part-time students to assist with clerical functions.

The Director of the program is a woman who started with the program as an administrative assistant and upon the departure of the director, was promoted. Prior to joining the PTI staff she had not acquired any education in either law or social sciences. Many of the counselors either already have or are acquiring degrees in the social sciences. Although the salary for counselors is only $8200.00 per year, the program has had a limited turnover and most of the staff have been with the program for over two years.

Except for the individuals provided by the probation department, every other staff member is in addition to the pre-existing staffs within the county and no other county activity experienced a reduction in personnel as a consequence of the establishment of the PTI program.

d. Budget

At the present time the PTI budget is approximately $232,000.00 per year; however this does not in any way, shape or form reflect the true costs of the program, for the salaries of the student clerical workers, the SETA employees and the probation officer are not included. Additionally, the program receives its spaces and utilities from the county, without cost, and other costs associated with the program such as office supplies, furnishings and Travel and training expenses are paid by the county. Many of the participants are referred by the staff to other county agencies for assistance and treatment and the cost of these services is not reflected in the program's budget.

No program or activity within the county has experienced a reduction in funding as the result of the PTI program, and there has not yet been any cost-effectiveness study.

e. Admission Criteria and Procedure

The Hudson County PTI program accepts applications from all offenders, and due to the age of the program, the Director felt that it is unlikely that any lawyer in the county is unaware of the program. Referrals result principally from the general advisements and the forms given out by the municipal courts when a non-indictable offender appears before them. If an individual is indicted, he receives notice of the program from the judge at his first appearance, and again in written form from the office of the Trial Court Administrator.

All individuals who desire to participate must come in person to the PTI office. Upon reporting they are given an extensive interview utilizing the standard state forms and local forms. The counselor fills out the forms based on the applicants responses.

Except for a computor check of State Bureau of Investigation and Federal Bureau of Investigation files, no effort is made to check the accuracy of the information given unless the counselor suspects deception on a particular answer.

If an applicant is not immediately rejected, after the initial interview he goes through a period of evaluation and participation which lasts six to eight weeks, and if he successfully completes this phase of the program, he is enrolled.

The individuals participation in PTI has little, if any, effect on his chances for bail or R.O.R. This is principally because Hudson County has an extremely active bail program and anyone who would be eligible for PTI would most likely also be a good candidate for bail or R.O.R.

In 1977 1,480 applications were received and of these 540 were for indictable offenses and 940 were for non-indictable offenses. 254 of these applicants were enrolled, 821 were rejected and 326 were awaiting acceptance. 61 successful applicants had their charges dismissed and 18 were terminated.

f. Operation of Program

The Hudson County Program attempts to deal with all problems that are deemed to be causally connected to the alleged offense and which can be rectified or improved in the prescribed period.

The client to counselor ratio fluctuates between 50:1 and 70:1 with 3/5 of the case-load being in the informal evaluation and participation stages.

The exact program of"treatment" is decided upon by the counselor after extensive interviews with the applicant. Before an individual is formally accepted, the "Treatment" must be approved by the Counselor Supervisor, the Program Director, and the Judge.

The treatment and supervision an individual receives does not vary according to whether or not he has been formally enrolled; however, it will vary with the individuals needs. No affirmative effort is made to check with employers, police, family or acquaintences to determine how the participant is responding to the "treatment."

The Hudson County Program does a great deal of one-to-one counseling, and it is primarily on this subjective evaluation and the absence of a re-arrest record that the determination of successful completion is based.

The staff receives constant supervision and training through weekly staff meeting and training sessions. Uniformity of actions is to some extent achieved by having the final decision on rejections, recommendations for

acceptance and termintaion come from the director.

g. Termination

The principle reason for rejection during the informal stage and termination during the formal stage have been poor participation and re-arrest for a serious crime. The procedures utilized in both situtations are similar. If an individual does not respond to counselor warnings, the counselor submits a memo to the director recommending rejection or termination. If the director concurs, the individual is notified of the proposed action and is given the opportunity to present evidence to avoid the action. About 10% of the non-indictables proposed for rejection in the situtation resist the proposal, 5% of the indictables resist it, and only 2% of all those recommended for termination resist it.

If an individual is rejected or terminated no special action is taken in the case, and it is assumed that they are eventually prosecuted in a normal fashion.

h. Evaluation of Program

The Hudson County Program has made a very real effort to keep statistics, and they have a research staff which keeps monthly and annual figures.

Figures provided show that between the inception of the program in 1972 and December 31, 1978, 6,283 individuals were interviewed. 1,598 had their charges dismissed, 3,297 were rejected, 553 were terminated, and 835 were still pending or enrolled. Thus, of the people who had been

completely processed by the program, 29% had their charges dismissed after successfully completing the program, 60.5% were rejected before being enrolled and 10.15% were terminated after enrollment.

The Hudson County program has attempted to keep figures reflecting recidivism, but they admit that such figures are inaccurate and deceptively low. The major problem with these figures is that they only reflect re-arrests for in-state offenses which result in fingerprinting. Thus, re-arrest for the majority of disorderly person type offenses would not appear. Although it is possible that out of state offenses might be included, there is no assurance of this. These figures have, in the past, been routinely provided by the State Bureau of Investigation for all prior Hudson County applicants, but recently the State Bureau of Investigation has discontinued this service and at the present time no alternative means is available.

Keeping in mind that the figures are overly optomistic, They show that 16.3% of all applicants have been re-arrested. This includes 11.07% of those who had their charges dismissed, 32% of those terminated and 20.35% of all those rejected. As optimistic as these figures are, they are nonetheless much worse than the figures given by the Chief Justice in his speech to the legislature.

i. Future Plans for the Program

It is not anticipated that there will be any significant changes in the program in the forseeable

future. At the present time the program employees are not included within the state civil service program, but there is a movement afoot to include these employees. The effect of including these jobs within civil service could be increased cost and decreased flexibility, but at the present time it is not possible to accurately predict the actual effect.

j. Other Comments

This program is making a very real attempt to evaluate it's achievements, but due to it's limited research staff and the fact that accurate cost and recidivism statistics are not available, it is impossible for even this program to honestly evaluate it's effectiveness.

VII SUMMARY

The New Jersey Pretrial Intervention Program has grown from a single project primarily devoted to solving employment related problems of minor offenders to a state wide system of projects which hope to treat a multitude of problems. New Jersey has chosen to base its program on court rule rather than prosecutorial discretion or legislative enactment, and this has resulted in some friction between the judiciary and the other branches of the government. The full magnitude of this friction has probably not yet been realized, for in the majority of case 95% of the funding for the projects has been provided by federal and state agencies. As the initial grants expire and the counties are called on to fund these local projects, it can be assumed that certain counties will feel that their resources can be more productively spent in other areas. It remains to be seen if the judiciary will attempt to order local governments to fund these programs and what the reaction of the other branches will be to such an order.

The goals of the New Jersey Pretrial Intervention Program have been recognized by the courts as two fold. In the order of their declared priority they are (1) rehabilitation, and (2) expeditious processing of the criminal calanders.

It has long been recognized by some commentators that there are certain constitutional problems inherent in the procedures associated with pretrial diversion programs. The New Jersey Supreme Court has attempted to resolve these problems by publishing a court rule and official guidelines that safeguard the rights of participants and applicants and which supposedly avoid unconstitutionally infringing on those areas reserved to the other branches of government under the separation of powers doctrine.

The Chief Justice of the Supreme Court of New Jersey has declared that the true test of the programs effectiveness is measured in recidivism, that is, re-arrest after successful program participation. Although some programs have attempted to show that they have materially reduced recidivism, there has been no sound statistical basis for their claims, and it does not appear as though any program in New Jersey has at the present time the means of routinely following successful participants to validly determine a rate of recidivism.

Likewise the Chief Justice has claimed that the available evidence indicated ~~the~~ pretrial intervention programs save money; however, there is simply no valid evidence which even remotely supports his comments. First of all in making this claim the Chief Justice compared the supposed cost of sending a man through a pretrial intervention program with the costs of sending individuals to prison or through a program of probation.

Interviews with experienced individuals in the field indicate that it is extremely doubtful that any pretrial intervention participant would have been sent to prison, and few participants would have received as much supervison in a probation program as they receive in PTI. It is thus readily apparent that the Chief Justice was attempting to compare costs associated with the handling of two dissimilar groups. From interviews with program coordinators, it is rather obvious that in fact there is no way under the present system to evaluating the true costs associated with pretrial intervention, for many of the costs of the program such as rent, utilities, furnishings, administrative supplies and the costs of professional evaluation and treatment are provided at no cost to the individual projects.

When one considers the nature of the offender who is accepted into the pretrial intervention programs, the type and cost of the rehabilitative services he would have received under pre-existing procedures, and the type and cost of the services he is receiving under the pretrial intervention programs, it becomes obvious that the costs of the criminal justice system have been increased rather than decreased as the result of pretrial intervention.

Not only is there no valid evidence to show that pretrial intervention saves money, but also there is no evidence to show that pretrial intervention expedites

the disposition of any cases within the criminal justice system. Due to the nature of the offenses and the offenders, the majority of the cases disposed of through pretrial intervention would have received a minimum of attention under pre-existing procedures, but under pretrial intervention the length of time the individual spends intimately involved with the criminal justice syatem is probably increased. Of the total number of offenders processed by the New Jersey courts batween September 1, 1975 and August 31, 1976 less than 1% were disposed of through pretrial intervention programs. It is simply contrary to logic to assert that the removal of this small a percentage of the less serious offenders from the criminal justice system expedited the disposition of the remaining cases.

Although the Supremem Court of New Jersey has attempted to attain a degree of uniformity among the different county programs, at the present time there are still many important areas of dissimiliarity. Probably the most significant area is that of eligibility. Some programs accept applications from all offenders while others have announced and unannounced restrictions on who may apply. So long as this difference continues, the New Jersey Pretrial Intervention Program will be susceptable to attack by rejected applicants on equal protection grounds. There are presently cases before the state appellate courts which will hopefully resolve this problem.

VIII CONCLUSIONS AND RECOMMENDATIONS

The author concludes that

The Pretrial Intervention Program in New Jersey is an extremely expensive piece of judicial legislation. In its enthusiasm to implement this innovative reform, the Supreme Court has transgressed the boundaries outlined under the separation of powers doctrine.

It has attampted to usurp the power of the legislature to define classes of offenders by taking it upon itself to decriminalize certain offenses it considers to be victimless, and by giving offenders the opportunity to avoid prosecution when, in the courts opinion, the conviction will harm the individual. By doing this the Courts have, in effect, overridden the legislature's declarations that individuals who violate certain norms should be convicted and punished.

By mandating the establishment of programs and by dictating the scope of services to be provided by these programs, the court has effectively made appropriations decisions that are not rightfully theirs to make.

The Court has infringed on the prosecutor's discretion to provide or not to provide alternatives to prosecution. Traditionally the courts have had the power to review the actions of officials within the executive department to prevent gross abuses; however, this power to review has not been thought to

include the power to supplant in the first instance the judgement of the court for that of the executive. Although through court decision it has now been determined that the prosecutor's decision to reject an applicant will not be overturned except in the most extraordinary case, no such restraint has been forthcoming in other areas. It still remains true that a prosecutor may not accept the individual into the program, but rather he may only recommend enrollment to the court. Likewise, if a prosecutor is dissatisfied with a participant's performance, he may only recommend termination. It is thus apparent that not only has the court significantly infringed upon the executive powers merely by the establishment of the program, but they have usurped the executive powers to divert and to terminate.

Pretrial Intervention does not, contrary to the Chief Justice's remarks, intervene to remove certain accused defendants ~~for~~ from the revolving door corruption and futility of imprisonment. In fact, what it does is to act as a "creaming" process whereby minor offenders who would have received minimum sentences (not usually including confinement) are diverted without a conviction from the criminal justice system. There is simply no basis for saying that any significant number of PTI participants would have been imprisoned had not a PTI program been available. All

available evidence indicates that these individuals would have been quickly processed through the system and received at the most a period of ineffectively supervised probation.

Rather than fecilitating the expeditious disposition of cases within the criminal justice system, the pretrial intervention program in New Jersey has imposed an additional appendage on the system which can only complicate the processing of each participant's case, and which cannot have any significant effect on the speed of the disposition of the other cases within the system. Less than 1% of the offenders within the system are disposed of through PTI. One can only speculate as to what the effect on the system would have been had all the resources devoted to PTI been used to increase the staffs of the prosecution and the probation departments, but it is certainly possible that had this been done, a greater number of cases would have received more expeditious handling.

Not only does it appear as though PTI does not expedite the disposition of offenders, but it also appears obvious that it imposes an additional financial burden on the system. If as the Chief Justice alleged, PTI saves the taxpayers money because the cost per defendant is less than the cost of processing an inmate or a probationer, you would expect to see the overall cost of the system reduced. In fact,

just the opposite occurred. The staff and budget of each and every county criminal justice system was increased because of PTI, and no net savings resulted. In fact, when one looks at the extensive procedures involved and compares them with the treatment that the same defendnat probably would have otherwise received, it is not surprising that the cost of the system has been increased.

If we could determine that pretrial intervention was achieving its primary goal of rehabilitation, the increased costs might be tolerable; however, it is readily apparent that there is no evidence available on which to make this determination.

The Chief Justice stated that the true test of the program's effectiveness was recidivism. He claimed that continual tracking since 1972 indicated a New Jersey recidivism rate of 4.7%, and he compared this with 91% of prison inmates who had previous arrests before their present offense.[274]

First and foremost, it must be stated that recidivism is a totally irrelevant indicator, for it neither shows to what degree the services provided rehabilitated the defendant, nor does it show to what extent expeditious disposition has been achieved.

Not only is it irrelevant but, as used by the Chief Justice it is also inaccurate and misleading.

First of all the Chief Justice contended that

this figure was the result of continued tracking since 1972. In fact, only one of the six counties whose figures were considered had been in existence since 1972 and that county showed a rate of recidivism of 12%. The rearrests from which these recidivism rates were devised only included rearrests for which the individual was finger-printed and thus did not include the vast majority of offenses which are classified non-indictable and disorderly persons offenses. An individual could be rearrested 10 times and so long as he wasn't finger-printed, he would not be considered a recidivist by the Chief Justice.

Secondly, the comparison is misleading. Not only does it compare the records of two totally dissimilar groups, but it also compares different records. In the case of the PTI participant, we are saying that our records do not show any subsequent arrest <u>for which the ex-participant was finger-printed</u>. In the other case, we are saying that the inmate was at some prior time arrested for something which might or might not have been serious enough to have caused him to be finger-printed.

Recidivism should not therefore be used to evaluate the effectiveness of PTI prograns.

If we disregard recidivism as our evaluator, what then may we use?

So long as the goals are rehabilitation and expeditious processing, it will be necessary to use separate evaluators. Before we set these goals however, we should attempt to determine if they are attainable. Available evidence would clearly indicate that the medical model of the criminal justice system has been discredited, and that it is not possible to rehabilitate offenders through criminal justice processes. Until reliable information is produced to show that these types of offenders need to be rehabilitated and that we possess the means to achieve rehabilitation within the allowable time restraints, rehabilitation should be discarded as a goal of Pretrial Intervention.

Pretrial Intervention and other forms of formalized pretrial diversion are usually thought to be lineal descendants of police and prosecutorial discretion. The primary justification for the exercise of this discretion has always been the need of the prosecutor to allocate his resources to achieve maximum effectiveness and expeditious disposition of serious criminal cases. A co-equal need justifying the exercise of the discretion has been the need to impart some flexibility to the system in order to allow the system to make the most appropriate response to the particular offense and the offender. PTI should adopt the goal of its predecessors.

These two goals of expeditious disposition and system flexibility would be co-equal in importance and at least to some extent they would overlap. As the caseload in a prosecutor's office increases, it seems logical that if he is unable to get additional resources, he would have to redirect his existing resources to the most serious offenses and the most recalcitrant offenders. In doing so, in the absence of a program such as PTI, he would have to ignore or downgrade the charges against the minor offenders and hope that these individuals did not thereby develop disrespect for the law and subsequently commit a more serious crime. If the prosecutor could divert an individual to a PTI-type program, he could retain jurisdiction over the individual thus giving him the opportunity to more accurately evaluate the offenders nature. If the individual remained out of trouble, he could be dismissed, and hopefully, the experience of having lived under the fear of prosecution for a period of time would cause him not to have lost respect for the law.

As the caseload dropped, the prosecutor would divert fewer people, for now some of the less serious offenders would be convicted and punished by the courts.

Under both a heavy and a light case load the prosecutor would have at his disposal a tool to tailor

the response of the criminal justice system to the particular offender in light of the charged offense, and by maintaining jurisdiction over the offender for six months the prosecutor could more accurately determine what the appropriate system response should be. In some cases, dismissal might be appropriate, while in others a reduced charge or a particular plea bargained sentence might be the most appropriate disposition. In other cases, the period of evaluation might reveal that no leniency is appropriate and therefore the original prosecution would be reactivated.

As to the first goal, it would seem relatively simple to determine if, in fact, the PTI system was effective. If, by increased utilization of PTI the prosecutor was able to maintain a reasonable standard for timely disposition in the face of an increased caseload, the PTI program would have to be judged effective, while if he were unable to do so, the effectiveness of the program would be questionable. An increase or decrease in the crime rate would be regarded as an indicator of how effective or ineffective the system as a whole is.

Any attempt to evaluate the effectiveness of achieving the second goal would be entirely subjective. If the prosecutor felt that he was able to more appropriately exercise his discretion as the result of diversion, the program would be deemed successful.

Under a system with these redefined goals, it would seem appropriate to return to the prosecutor the power to accept or reject applicants in the first instance. His decision would only be reviewable for a patent and gross abuse of discretion. The prosecutor's decision not to dismiss or to abide by any other previously decided upon conditional disposition would be reviewable, but in light of the fact that the unconvicted participant had already been subjected to a measure of control, we should require additional safeguards to protect the participant's interests. It is recommended that if the prosecutor does not honor his original agreement he should be required to affirmatively show at a hearing that he has a rational basis for his action.

Although pretrial intervention has often been equated to probation and in fact it has been called "pretrial probation", it is merely a formalization of long-standing discretionary practices. By attempting to graft a rehabilitative goal onto this procedure, the proponents of PTI have weakened their own credibility. PTI has a place in the criminal justice system, but just as it has begun to be recognized that prison and probation do not rehabilitate, so will it eventually be recognized that PTI cannot achieve this elusive goal. When the proponents of PTI understand this, they will have taken the critical steps

towards contributing a useful new element to the criminal justice system.

1. See gererally S. Brakel, Diversion from the Criminal Process: Informal Discretion, Motivatiob and Formalixation, 48 Denver Law Journal 211 (1971) and K. Davis, Discretionary Justice (1969).

2. Goldstein, Police Discretion not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice, 69 Yale L.J.543 (1969).

3. Ferguson, Formulating Enforcement Policy: An Anatomy of the Prosecutor's Discretion Prior to Prosecution, 11 Rutgers L. Rev.507 (1957); Note Prosecutor's Discretion 103 U. Pa. L. Rev. 1057 (1953).

4. K. Davis, Discretionary Justice: A Preliminary Inquiry (1971); but see J. Herrmann, The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany, 41 U. of Chi. L. Rev. 468 (1974).

5. National Pretrial Intervention Service Center of the American Bar Association Commission on Correctional Facilities and Services, Monograph on Legal Issues and Characteristics of Pretrial Intervantion Programs (1974), at page i. (hereinafter cited as Monograph on Legal Issues).

6. Pretrial Diversion from the Criminal Process, 83 Yale L.J. 827 (1974) at 827.

7. See listing of the variety of different types of programs ranging from School Diversion Programs to Civil Committment of mentally ill in Pretrial Intervention Service Center, Source Book in Pretrial Criminal Justice Intervention Techniques and Action Programs, 133 (1974) (hereinafter cited as Source Book)

8. Supra, n.6.

9. Hearings on S.798 Before the Subcommittee on National Penitentiaries of the Senate Committee on the Judiciary, 93rd Congress, 1st session (1973) testimony of K. Mossman, Chairman of the Criminal Law Section of the Amer. Bar Ass'n., at 379.

10. State v Leonardis 71. N.J.85, 96-98 363 A. 2d 321, 326-328 (1976).

11. J. Gordon Zaloom, Pretrial Intervention Under New Jersey Court Rule 3:28, Proposed Guidelines for Operation, 2-3 (1974) (Hereinafter cited as Proposed Guidelines)

12. Supreme Court of New Jersey Order, Guidelines For Operation of Pretrial Intervention in New Jersey, (Sept. 8, 1976) at 1. (Hereinafter cited as Official Guidelines)

13. R. 3:28 Pretrial Intervention Programs

(a) In counties where a pretrial intervention program is approved by the Supreme Court for operation under this rule, the Assignment Judge shall designate a judge or judges to act on all matters pertaining to the program, with the exception, however, that the Assignment Judge shall him or herself act on all such matters involving treason, murder, kidnapping, manslaughter, sodomy, rape, armed robbery, or sale or dispensing of narcotic drugs by persons not drug-dependant.

(b) Where a defendant charged with a penal or criminal offense has been accepted by the program, the designated judge may, on the recommendation of the Trial Court Administrator for the county, the Chief Probation Officer for the county, or such other person approved by the Supreme Court as program director, and with the consent of the prosecuting attorney and the defendant, postpone all further proceedings against said defendant on such charges for a period not to exceed 3 months.

(c) At the conclusion of such 3-month period, the designated judge shall make one of the following dispositions:

(1) On recommendation of the program director and with the consent of the prosecuting attorney and the defendant, dismiss the complaint, indictment or accusation against the defendant, such a dismissal to be designated "matter adjusted-complaint (or indictment or accusation) dismissed"; or

(2) On recommendation of the program director and with the consent of the prosecuting attorney and the defendant, further postpone all proceedings against such defendant on such charges for an additional period not to exceed 3 months; or

(3) On the written recomendation of the program director or the prosecuting attorney or on the court's own motion order the prosecution of the defendant to proceed in the normal course. Where a recommendation for such an order is made by the program director or the prosecuting attorney, such person shall, before submitting such recommendation to the designated judge, provide the defendant or his or her attorney with a copy of such

13. (con't) recommendation, shall advise the defendant of his or her right to be heard thereon and the designated judge shall afford the defendant such a hearing.

(4) During the conduct of hearings subsequent to an order returning the defendant to prosecution in t the ordinary course, no program records, investigative reports, reports made for a court or a prosecuting attorney, or statements made by the defendant to program staff shall be admissible in evidence against such defendant. No such hearing with respect to such defendant shall be conducted by the designated judge who issued the order returning the defendant to prosecution in the ordinary course.

(d) Where proceedings have been postponed against a defendant for a second period of three months as provided in paragraph (c)(2), at the conclusion of such additional three month period the designated judge may not again postpone the proceedings but shall make a disposition in accordance with paragraph (c)(1) or (3), provided, however, that in cases involving defendants who are dependent upon a controlled dangerous substance the designated judge may, upon recommendation of the program director with the consent of the prosecuting attorney and the defendant, grant such further postponements as he or she deems necessary to make an informed decision, but the aggregate of postponement periods under this rule shall in no case exceed one year.

14. Official Guidelines, supra. n. 12, 14.

15. See also the definition of PTI in New Jersey which includes terminology restricting it to the period before plea. Proposed Guidelines, supra. n. 11.

16. Comments of Mr. Donald Phelan, Director, Pretrial Services Division, Administrative Office of the Courts, State of New Jersey.

17. Estimates obtained from copy of briefing information for Chief Justice Hughes, State of the Judiciary Address November 21, 1977 provided by Administrative Office of the Courts.

18. State of the Judiciary Address, November 21, 1977.

19. Printed copy of State of the Judiciary Address, November 21, 1977, 20 - 21.

20. Id.,19 -20.

21. Monograph on Legal Issues, supra. n. 5,1.

22. Printed copy of State of the Judiciary Address, November 21, 1977, 20 - 21.

23. Id., 20.

24. American Friends Service Committee, Struggle for Justice quoted in L. Radzinowicz, M. Wolfgang III Crime and Justice, 350.

25. Crime in New Jersey, 1976 Uniform Crime Reports, 30.

26. Id., 54.

27. Id., 67.

28. Crime and Justice, supra. n. 24, 351.

29. D. Skoler, Protection of Civil Liberties of Pretrial Intervention Clients (1973); Monograph on Legal Issues, supra. n. 5.

30. Proposed Guidelines, supra. n. 11, 3.

31. N.J.S.A. 2A:85-1.

32. N.J.S.A. 2A:85-5.

33. N.J.S.A. 2A:85-6.

34. N.J.S.A. 2A:169 et seq.

35. N.J.S.A. 2A:169-4.

36. N.J. CONST. art I, par. 8.

37. In Re Bueher, 50 N.J. 501, 236 A2d. 592 (1968).

38. Board of Health of Weehawken Tp. v New York Cent. R. Co., 10 N.J. 294, 90 A2d. 729 (1952).

39. State v Murzda, 116 N.J.L. 219, 813 A. 305 (1936).

40. Information on the Courts obtained from Report of the Administrative Office of the Courts 1976.

41. Where penalty does not exceed 1 year incarceration or $1,000.00 and offenses where the value of property does not exceed $500.00. Id., 6.

42. Arnold, 31 New Jersey Practice, Criminal Practice and Procedure, 225.

43. R. 3:4-1 ; See also R. 7:3-1(d).

44. R. 3:4-2.

45. Arnold, supra. n. 42, 247.

46. R. 3:28.

47. R. 3:4-2.

48. Id.

49. R. 3:28

50. Official Guidelines, supra. n. 12, Guideline 6.

51. N.J.S.A. 24:21-27.

52. N.J.S.A. 24:21-28.

53. N.J.S.A. 2A:169-11.

54. N.J.S.A. 2A:164-28.

55. R. 3:9-3.

56. Genessee County Citizens Probation Authority. See report of program in Source Book, supra. n. 7, 43-45.

57. State v Leoardis, supra. n. 10; see also Proposed Guidelines, supra. n. 11, 5 and Note, Criminal Practice - Pretrial InterventionPrograms- An Innovative Reform of The Criminal Justice System, 28 Rutgers L. Rev. 1203, 1205 (1975).

58. National Advisory Comm'n. on Criminal Justice Standards and Goals: Courts Report 29-30 (1973); 28 Rut. L. Rev., supra. n. 57, 1208.

59. Note, Pretrial Diversion from the Criminal Process, 83 Yale L. J. 827, 829 (1974).

60. Id.; Report of the Workshop on Pretrial Intervention in N.J., 99 N.J.L.J. 865 (Sept. 30, 1976); F. Zimring, Measuring The Impact of Pretrial Diversion from the Criminal Justice System, 41 U. of Chi. L. Rev. 224 (1974); Freed, Statement on H.R. 9007 and S.798 - Pretrial Diversion, Before the Subcommittee on Courts, Civil Liberties and Administration of Justice, Committee on the Judiciary, House of Representatives, 7-8 (1974); Goldberg, Pretrial Diversion: Bilk or Bargain 31 N.L.D.A. Brief Case 490 (1974)

61. Genese County C.A.A. in Flint Michigan, supra n. 56.

62. At that time the legislatures of Connecticut, Illinois, Massachusetts, and New York, Note, Addict Diversion: An Alternative Approach for the Criminal Justice System, 60 Geo. L.J. 667, 676-677 (1972), and soon after the New Jersey general program was implemented by court rule, the legislature adopted a drug diversion program for New Jersey, The New Jersey Controlled Substance Act N.J.S.A. 24:21-1 et seq. (1970), as amended, N.J.S.A. 24:21-1 et seq. (Supp 1975).

63. Note, Criminal Practice - Pretrial Intervention Program - An Innovative Reform of the Criminal Justice System, 28 Rutgers L. Rev. 1203, 1221 (1974-75). State v Winnie, 12 NJ 152 (19

64. R 3:28 Note, 1978 Rules Governing the Courts of the State of New Jersey.

65. State v Leonardis, supra n. 10.

66. Id.

67. Administrative Office of the Courts, 1976 Annual Report, P-23.

68. Criminal Practice, supra n. 63, 1211.

69. Proposed Guidelines, supra n. 11, 14.

70. Id., 13.

71. Id..

72. See State v Leonardis, supra n. 10, where the defendant was not even allowed to file application due to nature of offense and see also remarks relating to informal understandings infra pgs 93 and 111 which are in operation and are intended to discourage ineligibles from applying.

73. L. Wilkins, Treatment of Offenders: Patuxent Examined, 29 Rutgers Law Rev. 1102 (1976).

74. Following information on this program taken from Proposed Guidelines, supra 11, 15 and National Pretrial Intervention Services Center of the American Bar Association Commission on Correctional Facilities and Services, Portfolio of Descriptive Profiles on Selected Pretrial Criminal Justice Intervention Programs, Hudson County Pretrial Intervention Project, 44 (1974)(hereinafter cited as PTI Portfolio).

75. Compare remarks of Chief Justice in State of Judiciary Address at page 21 where he claimed the average cost to be $331.00.

76. State v Leonardis, 71 N.J. at 96, 363 A2d at 327.

77. Id. 71 N.J. at 98, 363 A2d at 328.

78. Id 71 N.J. at 102, 363 A2d at 330.

79. Id 71 N.J. at 100, 363 A2d at 329.

80. List of New Jersey Pretrial Intervention Programs compiled by Administrative Office of the Courts, Pretrial Services as of October 1, 1977.

81. 145 N.J. Super. 237 (Oct. 12, 1976) (Law Division).

82. List of N.J. PTI programs, supra n. 80.

83. Supra n. 10, n.76, n.77 and n.78.

84. State of the Judiciary, supra n.22, 19-20.

85. Report of Workshop on Pretrial Intervention in N.J. 99 N.J.L.J. 865, 879 (Sept. 30, 1976).

86. Pretrial Diversion from the Criminal Process, supra n.6, 849-850.

87. Burlington, Camden, Hudson, Mercer.

88. Although some of the employees came from the existing probation staffs, these staffs hired replacements upon the departure of the PTI employee. If PTI were to trult result in a net savings of resources, the total number of employees and the total budget (as adjusted for inflation) would have to be less after the PTI program than it was beforehand. This simply never occurred.

89. Administrative Office of the Courts, State of New Jersey Preliminary Report of the Administrative Director of the Courts for the Court Year 1976-77, 30.

90. Id (990 active participants).

91. This figure is based on the rate experienced by Hudson County in the first five years of operation. It only represents those who were formally enrolled after their successful completion of their "informal" participation. The Administrative Office of the Court advised the Chief Justice in its briefing papers

91.(con't) given to him in preparation for his State of the Judiciary address that these figures were probably representative of the state-wide picture.

92. Administrative Office of the Courts, State of New Jersey, 1976 Annual Report.

93. Preliminary Report 1977, supra n. 89, 14.

94. Stastics contained in Crime in New Jersey Uniform Crime Reports 1967-1976. 1977 figures from Preliminary Report, Id.

95. Chart consolidates figures found throughout annual reports. Id.

96. Prior to the 1976 Annual Report, the Administrative Office of the Courts

97. See chart Appendix B. The 80% figure is arrived at by dividing the number of pleas by the total number of cases that actually went to trial. Figures taken from the Annual Reports of the Administrative Office of the Courts, State of New Jersey.

98. Interview with Dir., Statistical Branch, Admin. Office Office of the Courts, Mr. P. Aiello,Mar. 29, 1978. During 1976 there were 44,056 sentences awarded and in 1977 there were 35,218. These figures exclude suspended sentences, but include multiple sentences awarded at a single trial.

99. Id.

100. In fact many of those interviewed in the county programs admitted that these people would have received little if any supervision. Infra Section VI.

101. Note, Reviewability of Prosecutorial Discretion: Failure to Prosecute, 75 Col. L.Rev. 130 (1975). J. S. Wright, Review Beyond Discretionary Justice, 81 Yale L.J. 579 (1972); and Davis, Discretionary Justice supra n. 4.

102. Id: Notes, Pretrial Diversion from the Criminal Process: Some Constitutional Considerations, 50 Indiana L.J. 783 (1975); Reiss, Prosecutorial Discretion, 68 Mich. L. Rev. 789 (1970).

103. Every Program Director interviewed acknowledged that his program either modified the state forms or used their own additional forms.

104. In fact this does not occur because there is an informal screening process whereby individuals who are clearly not eligible are not advised of the program.See infra Sec. VI.

105. I was advised that just such a tactic is being used in a neighboring county.

106. These informal understandings exist between the Office of the Public Defender, the Program Coordinators, privately retained counsel and the courts. In effect they involve a recognition that it is counterproductive to refer individuals who are clearly not eligible.

107. 15% of those rejected in Burlington County appealed to the Court.

108. In fact interviews indicated that the defendants who are accepted into PTI would have been considered ideal probationers. They would have received little if any attention from the overworked staffs of the probation department. Through necessity it seems that these staffs must operate on the theory that it is the squeaking wheel that gets the grease. See Section VI infra.

109. Webster's Third International Dictionary Unabridged (1961).

110. Both the Manhattan Court Employment Project and Project Crossroads in Wash. D.C. were designed to correct employment related problems. Initially these programs and others were funded by the Department of Labor.

111. Obviously an outright dismissal would have the same effect. It is not inconceivable that in time prior participation in a PTI program will carry a stigma similar to the declaration of juvenile delinquency.

112. It is one thing to seek to give an unemployed but qualified individual an employment opportunity within the 3 to 6 month span of PTI, but it is quite a another thing to believe we can change a life style or an entire outlook of an 18 to 25 year old in this time frame. This is particularly true when you consider that many PTI participants continue to live in the same environment and to have the same associates and that their only contact with the PTI program is the 2 or 3 hours a week they spend undergoing "treatment".

113. R. Fishman, An Evaluation of Eighteen Projects Providing Rehabilitation and Diversion Services, Quoted in M. Wolfgang, R. Radzinowicz, III Crime and Justice,

114. The report of each and every pretrial diversion program reviewed by this author have all contained claims of

114. (con't) reduced recidivism as the pinciple evidence of the program's effectiveness. The reasons recidivism is considered an irrelevent indicator are set out in the following section of text.

115. Printed copy of the State of the Judiciary Remarks, supra n. 19, 20.

116. In New Jersey only 1 in 5 of the reported Crime Index Offenses result in an arrest.

117. Pretrial Diversion from the Criminal Process, supra n. 6, 847-50.

118. American Friends Service Committee, Struggle for Justice, supra n. 24, .

119. It is certainly arguable stigma in and of itself is a form of punishment, and for the lesser offenses the stigma of the conviction has a sufficiently severe retribuive and deterrent effect to satisfy the needs of society. Removing the stigma might be increasing crime rather than decreasing it. See Hart, The Aims of Criminal Law, 23 Law & Contemporaty Problems 401, 405-410.

120. Id.

121. Note, Pretrial Diversion from the Criminal Process : Some Constitutional Considerations, 50 Indiana L.J. 783, 783 (1975).

122. See generally Monograph on Legal Issues, supra n. 5: Pretrial Diversion from the Criminal Process, supra n. 6; Proposed Guidelines, supra n. 11; Protection of Civil Liberties of Pretrial Intervention Clients, supra n. 29; Criminal Practice- Pretrial Intervention Program- An Innovative Reform of the Criminal Justice System, supra n. 63 at 1212.

123. As evidenced by the rates of dismissal before and after charging there is still a considerable amount of discretion being exercised by police and prosecutors.

124. Telephone conversation with Mr. Donald Phelan, Director Pretrial Services Division, Admin. Office of the Courts March 29, 1978.

125. Compare Proposed Guidelines, supra n. 11, at 43-46 with Official Guidelines supra n. 12, at 2-4.

126. State v Leonardis, supra n. 10. (hereinafter cited as Leonardis I) and State v Leonardis 73 N.J. 360 (1977) (hereinafter cited as Leonardis II).

127. Supra n. 10.

128. The term "crime" is interpreted in many counties as not including nonindictable or disorderly persons offenses dispite the significant penalties that can be incuured for such violations.

129. See Section VI infra. These restrictions vary from unannounced but generally recognized policies that certain types of offense will not be admitted under any circumstances to the written announcements of the Official Guidelines and of the local programs which exclude for all practical purposes certain offenses.

130. Monograph on Legal Issues, supra n. 5, 44-52.

131. State v Forbes, 153 N.J. Super. 336 (1977); See also State v. Masucci, ___ N.J. Super. ___,(Jan. 23, 1978).

132. Monograph on Legal Issues, supra n. 5, 63: Proposed Guidelines, supra n. 11, 69-72.

133. Printed copy State of the Judiciary Address, supra n. 22, 20.

134. State v Kourtski, 145 N.J. Super. 237 (1976) (Law Div.).

135. There are presently pending before the Appellate Division of the Superior Court a number of appeals which raise the question of whether or not a county can exclude certain classes of offenders (indictable, nonindictable, disorderly persons) without denying the applicants equal protection of the laws.

136. Supra n. 126.

137. Id.,121.

138. Leonardis II, supra n. 126, 365-67.

139. Winberry v Salisbury, 5 N.J. 240 (1950); Busik v Levine, 63 N.J. 351 (1973). See also article discussing the merits of the Supreme Court's position G. Kaplan, W. Greene, The Legislatures Relation to Judicial Rule Making: An Appraisal of Winberry v Salisbury, 65 Harvard L, Rev. 234 (1951).

140. This author has been unable to find any case decided by the New Jersey Supreme Court declaring any court rule or part thereof to be an unconstitutional infringement on the areas reserved to the other branches of government.

141. Leonardis I, supra n. 126, 92.

142. Leonardis II, supra n. 126, 368.

143. Benjamin N. Cardozo, quoted in A.B.A. Standards, The Function of the Trial Judge, 4 (1972).

144. Bishop Hoadley's Sermon Preached Before the King, March 31, 1717, quoted in W. Lockhart, Y. Kamisar and J. Chopper, The American Constitution 1 (1964).

145. The Legislatures Relation to Judicial Rule Making, supra n. 139, 253.

146. In fact the comment accompanying the Official Guideline infers that it is the purpose of Guideline 1(c) to do just this by providing a " mechanism for minimizing p penetration into the criminal process for broad categories of offenders accussed of "victimless" crimes (emphasis in original), without relinquishing criminal justice control over such persons while statutes proscriptive of such behavior remain in force (emphasis added)." Official Guidelines, supra n. 12, 3.

147. Leonardis II, supra n. 126, 368.

148. Leonardis I, supra n. 126, 97 quoted in Leonardis II, supra n. 126, 368.

149. Crime in New Jersey, Uniform Crime Reports 1976,

150. Id.,

151. Copies of briefing information for Chief Justice Hughe's State of the Judiciary Address, provided by the Administrative Office of the Courts, State of New Jersey, 4-5.

152. Id.

153. See Appendix A. Note these figure only relate to indictable offenses.

154. Leonardis II, supra n. 126, 375.

155. Id.

156. Id., 376.

157. Id.

158. Id.

159. Id., 379.

160. Id.,note 6 at 374.

161. State v Kourtski, supra n. 134.

162. Leonardis II, supra n. 126, 381.

163. Id., 381-82.

164. Id., 382.

165. Id.,n note 12 at 383.

166. Printed copy of State of the Judiciary Address, supra n. 22, 20.

167. H.R. 5792 and S. 1819, 95th Cong., 1st Sess.. Both referred to the respective judiciary committees and not yet rpt'd. out.

168. Statement of Richard J. Hughes, Chairman, A.B.A. Committee on Correctional Facilities and Services, Hearings Before the Sobcommittee on National Peniteniaries of the Senate Committee on the Judiciary on S. 798, Community Supervision and Services Act, 382.

169. S. 593.

170. ACR 40, Jan. 10, 1978.

171. SCR 40, Jan. 10, 1978.

172. State v Naglee, 44 N.J. 209, 226 (1965); State v Holroyd, 44 N.J. 259, 265 (1965). See also Gore v. United States 357 U.S. 386, 393 (1958).

173. Monograph on Legal Issues, supra n. 5, note 12 at 18.

174. Official Guidelines, supra n. 12, Guideline 1.

175. Id., at 2-4.

176. When the judiciary determine the offense to be victimless and they determine that undue harm will befall a defendant if he is convicted of the offense and these determinations cause the judiciary to provide an alternative to prosecution, they are decriminalizing the offense.

177. State v Ivan, 33 N.J. 197 (1960); State v Carter, 64 N.J. 382, 392 (1974).

178. This remark is based on the fact that it has taken a great deal of judicial arm twisting to get some of the counties to establish programs.

179. New Rules are presented at the annual Judicial Conference, but this forum does not in any way resemble a legislative or administrative hearing in which all segments of the populace have a chance to effect the proposals.

180. Official Guidelines, supra n. 12, 1.

181. Winberry v Salisbury, supra n. 139.

182. See dissent in Winberry and The Legislatures Relation to Judicial Rule Making; An Appraisal of Winberry v Salisbury, both supra n. 139.

183. Leonardis II, supra n. 126, 369.

184. Monograpg on Legal Issues, supra n. 5, 14.

185. Leonardis II, supra n. 5, 367.

186. Griffin v Illinois, 351 U.S. 12, reh. den. 351 U.S. 958 (1956).

187. Rodriguez v San Antonio School District, 93 S. Ct 1278 (1973).

188. Salsburg v. Maryland, 346 U.S. 545 (1954).

189. Monograph on Legal Issues, supra n. 5, 33-34.

190. Supra n. 134.

191. In this case the U.S. Supreme Court allowed different criminal procedural practices to continue in various counties in Maryland because the procedures were under state law discretionary with the different counties. Thus so long as the questions of whether or not to establish a program, what problems the program should address are discretionary with the counties, it would seem permissible for variations to exist.

192. Some counties interpret the phrase " any crime " as a limitation. They feel that individuals charged with disorderly persons offenses and other nonindictable offenses can be excluded for these do not constitute crimes. There are presently cases before the Appellate

192. (con't) Division of the Superior court challanging this on equal protection grounds. Regardless of the outcome of this claim, it would appear that the Supreme Court did not intend when it published the Official Guidelines that they should be interpreted in such a restrictive manner. Guideline 3(c) specifically states, " Jurisdiction: Only defendants charged with criminal or penal offenses in the criminal or municipal courts of the Stae of New Jersey may be enrolled pursuant to R. 3:28". (emphasis added) Guideline 3(d) only excludes those charged with minor offenses where the likely disposition would be a suspended sentence without probation or a fine. (emphasis added)

193. See preceading footnote.

194. Official Guideline 3(i), supra n. 12. Not also that the Supreme Court has held the nature of the offense may be the sole basis for the prosecutor's or program director's rejection. Leonardis II, supra n. 126, 328. See also State v Tumminelli, Superior Court Appellate Division A- 3362-76 decided Nov. 23, 1977 (unpublished decision) and State v Litton, _____ N.J. Super. ____ (Dec. 20, 1977) where the Appellate Division reversed the trial courts order admitting the applicant over the objection of the prosecutor and the program director.

195. Leonardis I, supra n. 126, 102.

196. Bergen, Hudson, Mercer, Morris.

197. Atlantic, Cape May, Cumberland, Essex, Gloucester, Hunterdon, Middlesex, Monmouth, Ocean, Passaic, Salem, Somerset, and Union.

198. Burlington and Camden.

199. Camden T.A.S.C.

200. Newark T.A.S.C.

201. Jersey City ARP.

202. As previously noted the Guidelines state " every defendant who has been accused of any crime shall be eligible". See text of not 192, supra.

203. Note 187 and 188 supra. See also Baxstrom v Herold, 383 U.S. 107 (1966).

204. Sherbert v Verner, 374 U.S. 398 (1963); Shapiro v Thompson, 394 U.S. 618 (1969).

205. Dandridge v Williams, 397 U.S. 471 (1970).

206. Monograph on Legal Issues, supra n. 5, 32-33.

207. N.J. CONST. art I, sec. 10.

208. Barker v Wingo, 407 U.S. 515, 527-528 (1972).

209. 131 N.J. Super. 484 (App. Div.), cert. denied, 66 N.J. 329 (1974).

210. State v Szima, 70 N.J. 196 (1976).

211. In Camden and Mercer counties the program administrators interviewed indicated that this was not a problem for the defendant is never removed from the trial calandar and at the present time it would take a defendant longer to come to trial than it does for him to complete the PTI program.

212. Brady v. United States, 397 U.S. 742 (1970).

213. North Carolina v Alford, 400 U.S. 26 (1970).

214. Id.,31.

216. Miranda v Arizona, 384 U.S. 436 (1966); State v Kremens, 52 N.J. 303 (1968) after remand 57 N.J. 309 (1971).

215. Johnson v Zerbst 58 S.Ct. 1019. But see Schneckloth v Bustamonte, 93 S.Ct. 2041.

217. State v Graham, 59 N.J. 366 (1971).

218. Katz v United States, 389 U.S. 347 (1967); Schneckloth v Bustamonte, 412 U.S. 218 (1973); State v Johnson, 68 N.J. 349 (1976).

219. But see Note, Pretrial Diversion from the Criminal Process: Some Constitutional Considerations, supra n. 102 where the author argues that such a hearing would be appropriate.

220. The comments accompanying Official Guideline 6 specifically note that under the liberal discovery rules of New Jersey the defendant would have such a chance to discover and evaluate the evidence against him. Official Guidelines, supra n. 12, 14.

221. See Note, Pretrial Diversion from the Criminal Process: Some Constitutional Considerations, supra n. 102; and

221. (con't) Proposed Guidelines, supra n. 11, 81 both advocating such representation. See also Monograph on Legal Issues, supra n. 5, 10-11.

222. Official Guidelines, supra n. 12, 14.

223. Application For Enrollment and Participation Agreement form issued by the Administrative Office of the Courts, State of New Jersey.

224. All counties checked used the standard form provided by the Administrative Office of the Courts, Form PT-8B (1/75)Rev.

225. Standard form issued by the Administrative Office of the Courts entitled "TERMINATION NOTICE" and sent out by the program on letterhead stationary of the Superior Court.

226. Official Guidelines, supra n. 12, Guideline 2,

227. Id., Guideline 3(i).

228. This is similar to the situation where an incarcerated individual is seeking parole release. It has been consistantly held that in that situation there is no constitutional right to a due process hearing. See Menechino v Oswald, 430 F. 2d 403 (2d Cir, 1973) and Puchalski v New Jersey State Parole Bd., 55 N.J. 113 (1969) cert. den. 398 U.S. 938 (1970).

229. Revocation of parole and probation require due process safeguards. See Morrissey v Brewer, 408 U.S. 471, (1972) (parole) and Gagnon V Scarpelli, 411 U.S. 778 (1973) (probation).

230. Leonardis I, supra n. 126, 122.

231. Supra notes 226 and 227 with accompanying text.

232. 145 N.J. Super. 257 (Law 1977).

233. Id.,260.

234. Leonardis II, supra n. 126, 382-83.

235. Id. (emphasis in original).

236. Id.,384.

237. 153 N.J. Super. 336 (Law 1977).

238. In State v Masucci, ____ N.J. Super _____ (LAW 1978) the defendant was deniedenrollment and appealed. Pursuant to the appeal his attorney served a subpoena on the program director and the prosecutor. The subpoena sought (1) to take the testimony of the author of the adverse admission evaluation:(2) to inspect and copy any and all adverse statements allegedly made by the applicant; (3) to examine the probation department's file concerning the applicant's juvenile record; (4) to examine any confessions or admissions made by the defendant;and (5) to dicover the names of persons interviewed by the author of the adverse report and to obtain copies of any statements made by them.

The defendant's theory was that he needed this information to show that the evaluation was wrong and that thus his rejection was improper.

The court held that any errors in the evaluation could be corrected by the defendant submitting the correct facts to the court, and although usually matters that the director considers must be shown to the defendant, in some cases they need not be if to do so would embarass or endanger the source. The court did allow the defendant to view his juvenile record.

This case is another restriction on the defendant's means of showing that a rejection decision is improper.

239. Supra n. 228.

240. See procedures for rejection discussed in Section VI, infra. Each individual is given the opportunity to present matters either in writing or in person showing why he or she should not be rejected, The rejected applicant is advised in writing of the reasons for his or her rejection and is given the opportunity to appeal the decision to the court. Although the burden on appeal is extremely heavy, it would seem as though due process requirements are being met both in theory and in practice.

241. Gagnon v Scarpelli, supra n. 229.

242. Goldberg v Kelly, 397 U.S. 354 (1970).

243. Morrissey v Brewer, supra n. 229.

244. Caramico v Sec. of Dep't of Housing and Urban Dev., 509 F2d 694 and Wilson v Lincoln Redev. Corp., 488 F2d 339, 342.

245. Leonardis II, supra n. 126, note 12 at 383.

246. R 3:28(c)(1), supra n. 13.

247. R 3:28(c)(2), supra n. 13.

248. R 3:28(c)(3), supra n. 13.

249. Id. (emphasis added).

250. Id.

251. Form letter issued by the Administrative Office of the Courts. This letter was being used in all the counties visited.

252. Supra n. 225.

253. Mr Donald Phelan.

254. Crime in New Jersey, 1976 Crime Report, 12.

255. The majority of the following information was obtained during personal interviews with the Program Coordinator, Mr. R.H. Aaronson and the judge primarily concerned with criminal matters in Burlington County, the Honorable Judge Kramer. See interview form Appendix B.

256. State Law Enforcement Planning Agency which is charged with the responsibility of administering and distributing federal funds.

257. This is true in all the programs and thus any statements made by the Chief Justice purporting to state the cost per participant is inaccurate.

258. Supra n 12 at 1.

259. Supra. note 192.

260. The Program Coordinator feels that it would be a breach of the programs confidentiality guarantees to allow the prosecutor to see the entire file; however, it is difficult to understand how the prosecutor can correctly perform his function if he is denied this information.

261. This procedure eliminates many of the lesser indictable offenders who would seem to be prime candidates for the PTI program.

262. The following information was obtained during personal interviews with the Program Coordinator, Mr. Richard Achey. See interview form Appendix B.

263. Crime in New Jersey, 1976 Uniform Crime Report, 18.

264. Released on Own Recognizance.

265. Although Mr. Achey is designated as the Program Coordinator, the Director of the Program has little if any effect on the operation of the program. Mr. Achey refers to himself as Doctor; however, the sole basis for the title is his J.D. degree.

266. Thus 53.5% of those on whom rejection/acceptance decisions have been made have been rejected.

267. 3% of those enrolled.

268. 98% of those enrolled.

269. The Program Coordinator refused to estimate the case load and would not allow interviews with his staff.

270. Crime in New Jersey, 1976 Uniform Crime Report, 13-14.

271. The following information was obtained during personal interviews with the Assistant Program Coordinator, Mr. Nick Carugno who has the day to day operational control of the program.

272. Crime in New Jersey, 1976 Uniform Crime Report, 16-17.

273. The following information was obtained during personal interviews with the Program Director, Ms. Rita Douglas, and her research assistant Suzanne Karkut.

274. Printed copy of the State of the Judiciary Address, supra. n. 19.

275. Information obtained from copy of the briefing information provided by the Administrative Office of the Courts to the Chief Justice for his State of the Judiciary Address.

QUESTIONAIRE

I. INITIATION OF PROGRAM

A. Who initiated program? When?
b. Who developed program ?
C. Who submitted proposal and when ?
D. Was there any dissent ? Who ?
E. Request copy of Proposal.
F. Any changes made by Supreme Court ?

G. When was approval obtained ?
H. When did program begin screening ?
I. How was program initially funded ?

II. STAFF

A. How many on staff ?
B. What are their duties and titles?

C. What is their prior experience ?

D. What are their salaries ?

E. Where did these positions come from ? Were these positions taken from probation department or other government or are they in addition to existing staffs ?

F. What has been your staff turnover ?

III. BUDGET

A. What is total budget ?
B. How funded ?
C. Please breakdown according to:
   Salaries
   Administration
   Purchase of services
   Other

D. Was budget of other county or court unit decreased as the result of the establishment of PTI ? By how much ?

E What financial support is received from other governmental or nongovernmental entities ?

F. What services including space and furnishings are provided by other entities and what is the cost to PTI of these ?

G. Has there been or is there planned a cost effectiveness study ?

IV. ADMISSION

A. How do following defendants receive notice of program ?

Issued Summones

Arrested during non-court hours

Arrested or summoned in area other that where PTI office located

B. Do you use a referral form ? Request copy.

C. Who fills it out ?

D. Do you use initial interview form? Request copy.

E. Who fills it out ?

F. Do you accept:

Indictable	Disorderly Persons
Non- indictable	Ordinance Violations
Drug	

G. If your program does not accept any of the above types are they nonetheless allowed to apply for the program and are their applications forwarded to the prosecutor ?

H. How many people have been referred to PTI ?
I. Total number given initial interview ?
J. Are individuals told not to bother ?
K. Is there a period of informal participation and investigation ?

How Long
What type of participation

How many are terminated during this period
Own request
At programs request

L. What effect does participation have on chance for bail or ROR ?

M. To what extent does your admission investigation discover:

Ind. Offenses

Non-ind. Offenses

Disorderly Persons Offenses

Ordinance Violations

Juvenile Records

Out of State Offenses

Prior PTI Participation in and out of county

N. Is employer contacted

O. Are family or friends contacted

V. OPERATION OF PROGRAM

A. What type services does your program provide ?

B. What is the client/ counselor ratio

C. Who determines what program is necessary for a particular client ?

D. What type supervision is given client during informal participation

E. What type supervision is given during formal participation ?

F. What affirmative action is taken to see how participant is doing with family, friends, job or school before decision to terminate or dismiss is made ?

G. What is basis for deciding that man has successfully completed program ?

H. How is staff supervised to insure uniformity and adherence ?

VI. TERMINATION

A. How many are terminated during formal participation ?

B. What are reasons for terminating ?

C What are procedures for terminating during :

Informal Stage

Formal Stage

D. Is a participant given informal warnings of unsatisfactory participation before receiving formal warning ?

E. What number and percent of those formally notified resist decision ?

F. What number and percent of these initial decisions to terminate are changed if the participant resists ?

G. What number and percent contest formal recommendation to terminate ?

H. What actually happens to those terminated ?

VII. EVALUATION OF PROGRAM

A. Has there been an evaluation of programs effectiveness ?

B. Request Copy

C. Who conducted evaluation ?

D. What critera was used for measuring success?

E. How long are participants followed?

F. What affirmative means are taken to check following type arrests ?

Ind.
Non-ind.
Dis. Pers.
Ordinance Violations
Out of State

G. Does cost per participant include :
Your budget
Services provided by others
Court and pros. time

H. By what figure is the total cost divided ?

I. Does total of participants include those informally terminated ?

VIII. FUTURE PLANS FOR PROGRAM

IX. OTHER COMMENTS